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No. 80-

Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

BENSON REALTY CORP., CHAI ASSOCIATES, INC., HINCKLEY REALTY CORP., 615 EAST 168TH ST. CORP., ROBERT BEREZIN, SHIRLEY BEREZIN, MORRIS FADER, ANITA FADER, COMMUNITY HOUSING IMPROVEMENT PROGRAM, INC., BRONX REALTY ADVISORY BOARD, INC., ASSOCIATED BUILDERS & OWNERS OF GREATER NEW YORK, INC., AND 383 EAST 17TH ST. INC., INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,

Appellants,

v.

EDWARD KOCH, AS MAYOR OF THE CITY OF NEW YORK, ANTHONY GLIEDMAN, AS ADMINISTRATOR OF THE HOUSING AND DEVELOPMENT ADMINISTRATION OF NEW YORK CITY, DANIEL W. JOY, AS COMMISSIONER OF THE DEPARTMENT OF RENT AND HOUSING MAINTENANCE OF NEW YORK CITY, JOSEPH B. GOLDMAN, AS COMMISSIONER OF THE NEW YORK STATE DIVISION OF HOUSING & COMMUNITY RENEWAL AND CITY RENT AGENCY,

Appellees.

On Appeal from the Court of Appeals of the State of New York

JURISDICTIONAL STATEMENT

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QUESTIONS PRESENTED

1. Whether the New York City rent laws extend beyond the constitutional limits of the State's and City's police power when they rest solely on a continued declaration of "emergency" which, after a period of thirty-seven years, can no longer be regarded as "temporary," and their validity is sustained on the basis that the non-existence of the emergency has not been proved "beyond a reasonable doubt."

2. Whether the New York City rent laws, in their present operation and effect, on the admitted facts, are an unconstitutional taking without compensation in violation of the due process clause of the Fourteenth Amendment.

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EDWARD KOCH,[1] AS MAYOR OF THE CITY OF NEW YORK, ANTHONY GLIEDMAN, AS ADMINISTRATOR OF THE HOUSING AND DEVELOPMENT ADMINISTRATION OF NEW YORK CITY, DANIEL W. JOY, AS COMMISSIONER OF THE DEPARTMENT OF RENT AND HOUSING MAINTENANCE OF NEW YORK CITY, JOSEPH B. GOLDMAN, AS COMMISSIONER OF THE NEW YORK STATE DIVISION OF HOUSING & COMMUNITY RENEWAL AND CITY RENT AGENCY,

Appellees.

On Appeal from the Court of Appeals of the State of New York

JURISDICTIONAL STATEMENT

[1] Edward Koch substituted for Abraham Beame, respondent in the courts below; Anthony Gliedman substituted for Thomas Appelby; and Joseph B. Goldman, substituted for John G. Heimann; all pursuant to Rule 40.3 of the Rules of this Court.

OPINIONS BELOW

The Memorandum Opinion of the Court of Appeals (App. A., *infra*, pp. 1a–2a) has not yet been reported. The order and opinion of the Appellate Division, Second Department (App. B, *infra*, pp. 3a–6a) is reported at 72 A.D.2d ____, 421 N.Y.S.2d 826. The decision of the trial court (App. C, *infra*, pp. 7a–13a) is unreported.

JURISDICTION

The judgment of the New York Court of Appeals was entered on June 26, 1980. A notice of appeal was filed in the New York Court of Appeals on September 10, 1980, and a copy of the notice of appeal was filed in the Supreme Court of New York, Kings County, on the same day. On September 17, 1980, Mr. Justice Marshall entered an order extending the time for docketing this appeal to and including October 24, 1980.

The jurisdiction of this Court rests on 28 U.S.C. §§ 1257(2) and 2101(c).[2]

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[2] Although New York City's rent laws have been enacted primarily by the City's government rather than the state legislature, this Court has held that "[a] local ordinance is deemed a statute for purposes of invoking this Court's jurisdiction under 28 U.S.C. § 1257(2)." *Erznoznik* v. *City of Jacksonville*, 422 U.S. 205, 207 n. 3.

The constitutional questions under the Federal Constitution were raised in the Complaint filed on June 29, 1977, in the Supreme Court of New York, King's County, pars. 6(d), 24, and 38 (R. 164, 172-73, 186); and these arguments were advanced through citation of constitutional decisions of this Court in each of the courts below. [The R. references, here and below, are to the Record in the New York Court of Appeals.]

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the Constitution provides, in pertinent part, as follows:

> No person shall . . . be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

The Fourteenth Amendment to the Constitution provides, in pertinent part, as follows:

> . . . No state shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATUTES INVOLVED

Laws of the State of New York for 1962, Chapter 21, as amended (the Local Emergency Housing Rent Control Act);

Laws of the State of New York for 1974, Chapter 576, as amended (the Emergency Tenant Protection Act);

The New York City Administrative Code, Chapter 51, Title Y, §§ Y51-1.0—18.0, as amended (New York City Rent and Rehabilitation Law);

The New York City Administrative Code, Chapter 51, Title YY, §§ YY51-1.0—7.0, as amended (New York City Rent Stabilization Law).

These are set out in Appendix D, *infra* pp. 15a–41a.

STATEMENT

A. Statutory Background

Rent control has been in effect in New York City in some form for the past 37 years. On November 1, 1943, rent controls became effective in the City under the Federal Emergency Price Control Act of 1942. These World War II price controls froze rents for all rental housing units at the levels which existed on March 1, 1943. In 1946, New York State enacted its first post-war residential rent control statute, the Emergency Housing Rent Control Law. This legislation filled in the gaps created by gradual federal decontrol of rents from 1946 to 1950. On May 1, 1950, the state assumed jurisdiction over rent and eviction controls. Both the 1946 and 1950 statutes recited the existence of a housing emergency as justifying this exercise of the state's power.

In 1962, pursuant to enabling legislation enacted by the state,[3] the city enacted its own rent control law.[4] This action was based on the city's determination that a "serious public emergency continues to exist in the housing of a considerable number of persons . . ."[5] Under the 1962 act, controls were continued on buildings completed on or before February 1, 1947. Rental units constructed after that date, however, were specifically exempted in order to encourage investments which would increase the housing supply.

By the mid-1960's, a housing surplus existed in New York City, but there were calls for an expanded form of rent control. Responding to these demands, the City Council passed the

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[3] Local Emergency Housing Rent Control Act, N.Y. UNCONSOL. LAWS § 8605 (McKinney 1974).

[4] N.Y. City Rent and Rehabilitation Law, New York City, N.Y. Admin. Code §§ Y51-1.0 to 18.0 in N.Y. UNCONSOL. LAWS (McKinney 1974).

[5] *Id.* § Y51-1.0.

Rent Stabilization Act of 1969.[6] Under the new law, buildings containing six or more units constructed between February 1, 1947, and March 10, 1969, became subject to "rent stabilization" whereby owners who qualified were entitled to periodic rent increases, subject to ceilings as provided in the statute.

In 1971, the state enacted Vacancy Decontrol laws[7] which provided that all apartments becoming vacant after July 1, 1971, would no longer be subject to any form of rent control or stabilization. Three years later, however, the state legislature passed the Emergency Tenant Protection Act.[8] The statute placed under rent stabilization those decontrolled and destabilized apartments which had been vacated during and after 1971. Moreover, the act extended rent stabilization to rental housing constructed between 1969 and 1973.

B. Factual Background

In their complaint, the plaintiffs asserted that approximately 1½ million housing units are subject to rent control or rent stabilization. Under rent stabilization, an owner may increase rents charged for his apartments only at the time a vacancy occurs or a lease renewal agreement is signed. The maximum percentage amount by which such rents may be raised is established annually by the New York City Rent Guidelines Board.[9] In determining these figures, the board is directed to consider the economic condition of the City's residential real estate industry, owner operating expenses, the

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[6] N.Y. Admin. Code §§ YY51-1.0 to 7.0 in N.Y. UNCONSOL. LAWS (McKinney 1974).

[7] N.Y. UNCONSOL. LAWS § 8582(2)(i) (McKinney 1974).

[8] N.Y. UNCONSOL. LAWS §§ 8621-34 (McKinney Supp. 1979).

[9] N.Y. Admin. Code § YY51-5.0(b).

cost of living, and housing supply and vacancy rate figures.[10] Generally speaking, the increases allowed have ranged from 4 to 8.5 percent for a one-year lease renewal with slightly higher percentages for multiple year leases.

Price adjustments for the City's rent controlled apartments are made under New York City Local Law 30 of 1970 (the "Maximum Base Rent Law").[11] Under this law, the City Rent Agency establishes a Maximum Base Rent ceiling, or MBR, for each rent controlled apartment. This is calculated to cover the owner's operating expenses (except financing), and allow him to receive an 8½ percent return on the equalized *assessed* value of his investment. Thereafter, the MBRs are recalculated biennially to reflect changes in the owners' costs.[12] However, when the MBR is more than 7½ percent above the rent which an owner has been permitted to collect, the rent increase may be no more than 7½ percent annually until the collectible rent equals the MBR. (R. 108, 109.)

In their complaint, the appellants made, *inter alia,* the following further assertions of facts which indicate that the continued operation of the New York City rent control and rent stabilization laws has had a disasterous economic impact on the plaintiff property owners.[13]

During the period 1960-1970, the defendants limited average annual co trolled rent increases to two percent, while in the

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[10] *Id.*

[11] N.Y.C. Admin. Code § Y51-5.0, as amended.

[12] MBR ceilings were increased 8½% in 1974, 22% in 1976, 9% in 1978 and 10% in 1980.

[13] Verified complaint filed in the trial court. (R. 167.) Since this is an appeal from a judgment directing the entry of a summary judgment, the uncontested facts contained in the complaint and in the plaintiff's affidavits must be taken most favorably to the plaintiffs. *See Poller* v. *Columbia Broadcasting System, Inc.*, 368 U.S. 464, 467; *Hospital Building Co.* v. *Rex Hospital Trustees,* 425 U.S. 738, 746-747; *Wolston* v. *Readers Digest Association, Inc.*, 443 U.S. 157, 162 n. 5.

period from 1965-1970 alone, the annual cost of skilled labor increased ten percent, unskilled labor increased six percent, and material and operating expenses increased from three to six percent. (R. 173-174.) Under the MBR program which went in effect in 1972, defendants have consistently failed and refused to issue timely MBR orders or to provide the necessary forms, thus preventing plaintiffs and their class from obtaining rent increases to which they had been entitled by statute. (R. 177-182.) Rent increases which have been permitted for both rent-controlled and rent-stabilized units did not grant relief to appellants from the burden of the extraordinary increase in fuel costs equalling more than 600 percent during the 1970's. (R. 179.)

The defendant's arbitrary and unreasonable administration of rent control has resulted in a difference between reasonable rents and controlled rents of the housing under rent control of approximately $800 million each year. (R. 164.) This "rent gap" constitutes a compulsory economic transfer from plaintiffs and the class they represent to tenants in the City. Moreover, by 1970, rental income permitted under rent control fell short of the costs of properly maintaining such housing by an annual amount of $275 million. (R. 175.)

As a result of the inability of owners to obtain the funds needed simply to maintain their buildings, in 1970 more than 400,000 occupied housing units subject to rent control were classified as deteriorated or dilapidated. (R. 174.) During the period from 1972 to date, the City of New York's failure to permit owners to collect a reasonable rent (*i.e.*, the fair rental value of their housing) has also brought about the greatest number of tax foreclosures ever, while real estate tax, sewer and water rental arrearages rose to $1.5 billion. Rent control resulted in a decrease in the assessed valuation of multi-family residential property by $1 billion from 1974 to 1975 alone as

well as an additional erosion of $500 million in the following year. (R. 175.)[14]

The limitations on plaintiffs' ability to raise rents imposed by New York City's rent laws have resulted in the abandonment by owners of 15,000 to 50,000 housing units annually since 1965. In 1974, for example, defendants announced that 36,000 units had been abandoned. (R. 170, 175.)

The affidavits filed in support of the plaintiff's motion for summary judgment contained the following additional uncontested assertions of fact, among many others:

In 33 years of rent control in New York City, a forced income transfer of an estimated $20 billion from controlled apartment owners to tenants has been achieved. (R. 99.) When the MBR program went into effect, 46.4 percent of all apartments would require a 45 percent or more increase in rent in order to give the owner a minimum economic rent. However, while the MBR formula was supposed to give owners the minimum rent required to maintain their premises, the statute itself prohibited the owner from collecting the minimum rent by limiting rent increases to no more than 7½ percent per annum. (R. 104, 107.) After the first MBR increase in 1972, rents provided revenues which were still $344 million short of the sum necessary for operation and maintenance in that year. (R. 140.) In the mid-1970's, up to 80 percent of rent-regulated housing properties in New York City were losing money. (R. 123.)

In addition to the massive scale of abandonments referred to in plaintiffs' complaint, rent control has caused many owners

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[14] This decrease in assessed value also resulted in a decrease in the permissible return on investment and equity, since the Maximum Base Rent ceiling is fixed as a percentage of the equalized assessed value of the investment. See p. 6, *supra*. Thus, a vicious circle is inherent in the statute — low rents produce low assessed values which further limit rents, until the property is milked and taken over by the city.

to default on their real estate taxes. By 1977, unpaid New York City real estate taxes passed $809 million. When the owners cannot make repairs and maintain services, on the one hand, and pay taxes on the other, the City takes over the property by foreclosure. In 1978 alone, the City of New York took title to over 120,000 units through *in rem* foreclosure. Consequently, rent control has made the City of New York the largest landlord. (R. 72.)

A loss of almost $2 billion of real estate taxes has resulted from the continued effects of rent control in New York City. (R. 83.) Moreover, rent control has been so debilitating to the real estate market, that it is its own cause of a low vacancy rate. (R. 96, 135.) The reason for the continued existence of rent control is primarily political. Governor Carey of New York, in explaining why rent control would not be repealed, noted in his testimony before the United States Senate Committee on Banking, Housing and Urban Affairs on April 1, 1976 (R. 93):

> Frankly, it is an election year, and we have more tenants than landlords in the State.

There has been a total breakdown in the administration of rent control and rent stabilization. (R. 31-40, 55.) The defendants have failed to administer rent control fairly and have purposely and intentionally taken steps calculated to hurt (if not destroy) owners of rent-controlled housing. (R. 63, 140-151.)

Summarizing the effects of rent control, the Temporary Commission on City Finances, in its Fifteenth Interim Report to the Mayor on "Rent Control and Rent Stabilization in New York City, June 1977," concluded (R. 154):

> [Rent control] is contributing to the deterioration of the sound housing stock of the city. . . . It is a major contributor to the city's real estate tax delinquency problem. Hundreds of millions of dollars are lost annually through reduced tax assessments on rent-controlled properties or are lost in building abandonment and demolition.

> Finally, rent control and rent stabilization have gone far toward bankrupting or demoralizing the real estate industry . . .

The affidavits contain numerous other uncontested factual statements supporting the contention of the appellants that the rent laws of New York have deprived the appellants of their property without due process of law, and have resulted in a taking of their property by forcing the transfer of its economic value to tenants or to the City of New York.

The basic facts advanced by the plaintiffs were not substantially controverted by the affidavits filed in support of the defendants' motion to dismiss and for summary judgment, which relied primarily on the ground that the complaint should be dismissed "as a matter of law" (R. 222, 223). The essence of the defendants' affidavits is found in the merely conclusory assertion that "rent control *is* constitutional" (R. 222)—no matter how badly it is administered, no matter how great the loss is to land owners, no matter how much of the landowners' property is taken from them and given to tenants, or, in many cases, to the City itself.

C. Proceedings Below

This action was commenced in July 1977, by the service of a summons and a complaint filed in the Supreme Court of New York, King's County. The plaintiffs sought a declaration that the rent laws violated the Fourteenth Amendment of the United States Constitution, and a permanent injunction against the continued enforcement of the statutes by the defendants. Subsequently, in April, 1978, the plaintiffs filed a motion for class action status, a preliminary injunction against further enforcement of the rent laws, and a summary judgment declaring the New York City rent laws unconstitutional. Affidavits were filed in support of this motion.

The defendants filed a cross-motion for summary judgment, seeking dismissal of the complaint on the ground that it

did not state a cause of action, and a declaration of the constitutionality of the statute. Affidavits were filed in support of this motion, and counter-affidavits were filed by the plaintiffs.

In a memorandum decision, the trial court denied the plaintiffs' motions and the defendants' cross-motions.[15] Instead, observing that "an early resolution of the constitutional issues presented in this action is . . . both desirable and important to the plaintiffs and others similarly situated as well as to the City and its residents," the court directed the parties to proceed expeditiously to trial and ordered that this matter be placed at the head of the appropriate trial calendar.[16]

Both parties appealed from the order and judgment of Special Term to the Appellate Division, Second Department. On November 13, 1979, the Appellate Division modified the order and dismissed the plaintiffs' complaint, finding that "plaintiffs have failed to set forth sufficient evidence to rebut the presumption that the laws in question are constitutional."[17]

Both parties appealed to the New York Court of Appeals. The plaintiffs again attacked the constitutionality of the New York City rent laws on the grounds that there is no longer a "temporary" emergency in housing in New York City and that the laws constitute a taking without just compensation in violation of the Fifth and Fourteenth Amendments. The Court of Appeals held that the appellants had not presented evidence to show "beyond a reasonable doubt" that New York City's rent laws are unconstitutional. On this basis, it concluded that the defendants were entitled to a declaration of constitutionality. With this modification, the court affirmed the lower court's order.[18]

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[15] App. C, p. 13a.

[16] *Id.*

[17] 72 A.D. 2d ____, 421 N.Y.S. 2d 826 (1979); App. B., p. 3a.

[18] App. A, p. 2a.

THE QUESTIONS ARE SUBSTANTIAL

INTRODUCTION

This appeal raises significant and important questions with respect to the New York City rent control and rent stabilization laws and their current and prospective validity under the due process and just compensation clauses of the Fourteenth and Fifth Amendments.[19] Appellants contend that the facts alleged in their complaints and affidavits, and admitted by the defendants' motion for dismissal and summary judgement, are sufficient to establish that these statutes are unconstitutional. The adverse decision of the New York Court of Appeals is in conflict with opinions of this Court as well as several decisions in other jurisdictions. Because of the widespread impact of rent controls in this country,[20] and the disastrous effect which rent laws have had on owners of rental housing in New York City, and the unique constitutional issues presented by this appeal,[21] these questions warrant review by this Court at this time.

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[19] The taking clause of the Fifth Amendment is made applicable to the states through the Fourteenth Amendment. *Chicago, B. & Q. R.R.* v. *Chicago,* 166 U.S. 226, 236.

[20] It is currently estimated that approximately 21 million persons (13.8% of the total U.S. urban population) live in rent-controlled jurisdictions.

[21] Other cases involving the validity of New York's rent laws in which appeals to this Court have been dismissed for want of a substantial federal question were based on different contentions from those presented in the present case. *See Kaplan* v. *Prince,* 67 A.D. 2d 1110, 412 N.Y.S. 2d 717, *appeal dismissed,* 444 U.S. 938 (rent stabilization claimed to be an unconstitutional impairment of contract rights and a taking without just compensation because the owner was prevented from eliminating services which the lease agreements permitted him to terminate); *8200 Realty Corp.* v. *Lindsay,* 60 Misc.2d 248, 304 N.Y.S.2d 384 (1969), *rev'd,* 34 A.D.2d 79, 309 N.Y.S.2d 443, *rev'd* 27 N.Y.2d 124, 261 N.E.2d 647, 313 N.Y.S.2d 733, *appeal dismissed,* 400 U.S. 962 (contention that rent stabilization law is invalid as an unconstitutional delegation of legislative authority to the Real Estate Industry Stabilization Association).

I. The Validity of Legislative Findings of a Housing Emergency in New York City Cannot Be Conclusively Presumed When the City's Rent Laws Have Applied for Thirty-seven Years, and the Constitutionality of the Laws Depends Upon the Actual Present Existence of Such Conditions.

A temporary emergency of the kind which initially may have justified the enactment of rent control legislation in 1943 cannot lawfully be regarded as continuing 37 years later without an affirmative showing that an emergency now exists in fact. Without such proof, the present operation of these statutes is constitutionally invalid. The New York Court of Appeals, however, rejected this contention, on the basis of what amounts to a conclusive presumption in favor of legislative findings of emergency, no matter how routinely made and long-continued. Noting that "[w]hether there is a need for controls is a matter for legislative determination in the first instance," the court held that "[t]he presumption of a factual basis for that determination is not overcome by mere passage of time, nor have [appellants] . . . presented evidence to demonstrate *beyond a reasonable doubt* that there is no factual basis." (App. A, *infra,* p. 2a; emphasis supplied.) The failure of the Court of Appeals to require justification for the routine legislative declarations with respect to the existence of a housing emergency, and its refusal to hold that the indefinite continuation of these laws by repeated perfunctory declarations violates the due process clause of the Fourteenth Amendment, was in conflict with the applicable decisions of this Court.

All rent laws which are currently in effect in New York City have been enacted pursuant to findings by the State Legislature and the City Council that "a serious public emergency continues to exist in the housing of a considerable number of persons. . . ."[22] Implicit in such declarations has

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[22] *See e.g.,* the Emergency Tenant Protection Act of 1974, N.Y. UNCONSOL. LAWS § 8622 (McKinney Supp. 1979).

been the recognition by these legislative bodies that the existence of an emergency calling for temporary relief of an extraordinary nature was a legal prerequisite to the institution of rent controls at the state or municipal level.[23] In explaining the rationale of its earlier decisions which had upheld rent control laws, this Court in *Home Building & Loan Association* v. *Blaisdell,* 290 U.S. 398, stated:

> In these cases . . . the relief afforded was temporary and conditional, [and these statutes were] sustained because of the emergency due to scarcity of housing . . . .

Id. at 441.[24]

Repeated declarations by a legislative body of the continued existence of an emergency are not conclusive for purposes

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[23] *Chastleton Corp.* v. *Sinclair, supra; Edgar A. Levy Leasing Co.* v. *Siegel,* 258 U.S. 242; *Marcus Brown Co.* v. *Feldman,* 256 U.S. 170; *Block* v. *Hirsch,* 256 U.S. 135; *City of Miami Beach* v. *Fleetwood Hotel, Inc.,* 261 So.2d 801 (Fla. 1972); *Lincoln Bldg. Assoc.* v. *Barr,* 1 N.Y.2d 413, 135 N.E.2d 801, 153 N.Y.S.2d 633, *appeal dismissed,* 355 U.S. 12; *Contra, Birkenfeld* v. *City of Berkeley,* 17 Cal.3d 129, 500 P.2d 1001, 130 Cal. Rptr. 465 (1976); *Hutton Park Gardens* v. *Town Council,* 68 N.J. 543, 350 A.2d 1 (1975); *Eisen* v. *Eastman,* 421 F.2d 560 (2d Cir. 1969).

[24] Several state courts have held that this Court's decisions in *Nebbia* v. *New York,* 291 U.S. 502, and *Olsen* v. *Nebraska,* 313 U.S. 236, have, in effect, eliminated the requirement that an emergency exist before rent control may be enacted. *See, e.g., Birkenfeld* v. *City of Berkeley, supra.* However, *Block* v. *Hirsh* and its progeny have never been expressly overruled. Furthermore, a number of courts which have addressed the issue since *Nebbia* and *Olsen* were decided have relied on this Court's 1920's rent control decisions in concluding that the existence of an emergency is a constitutional precondition to this particular temporary exercise of a state's police power. *See, e.g., Albigese* v. *Jersey City,* 127 N.J. Super. 101, 316 A.2d 483 (1974); *City of Miami Beach* v. *Fleetwood Motel, Inc., supra; Kress, Dunlap & Lane, Ltd.* v. *Downing,* 286 F.2d 212 (3d Cir. 1960); *Lincoln Bldg. Assoc.* v. *Barr, supra; Warren* v. *City of Philadelphia,* 387 Pa. 362, 127 A.2d 703 (1956).

of judicial review. *Id.* at 442; *Block* v. *Hirsh,* 256 U.S. at 154. In *Chastleton Corp.* v. *Sinclair,* 264 U.S. 543, for example, this Court recognized that "[a] law depending upon the existence of an emergency may cease to operate if the emergency ceases or the facts change even though valid when passed." *Id.* at 547-48. Consequently, while a legislative declaration that an emergency still exists is entitled to great respect, *e.g., Edgar A. Levy Leasing Co.* v. *Siegel,* 258 U.S. at 246, "[i]t is always open to judicial inquiry whether the exigency still exists upon which the continued operation of the law depends." *Home Building & Loan Association* v. *Blaisdell,* 290 U.S. at 442.

However, by requiring appellants to demonstrate "beyond a reasonable doubt" that there is no factual basis for these legislative declarations, the New York Court of Appeals, in effect, treated the findings of the State Legislature and City Council as supported by a conclusive presumption, and ignored the actual facts as they now stand in New York City with respect to the housing market under rent control. Thus, in effect, the New York Court of Appeals has decided the case on the basis that the actual facts are irrelevant. *Cf. Stanley* v. *Illinois,* 405 U.S. 645; *Cleveland Board of Education* v. *La Fleur,* 414 U.S.

Unlike the District of Columbia and New York City rent control laws which this Court upheld in *Block* v. *Hirsh, supra, Marcus Brown Co.* v. *Feldman, supra,* and *Edgar A. Levy Leasing Co.* v. *Siegel, supra,* the current New York City rent control and rent stabilization laws are constitutionally deficient in two respects. *First,* there is no factual (rather than merely presumptive) basis for the legislative findings that a housing emergency has continued to exist for 37 years. In 1943, available apartments were so scarce that people living in New York City were forced to double up with others in the same dwelling. In sharp contrast to the wartime housing situation, apartments in the City now are actually being abandoned at a rate of 15,000-50,000 units per year, primarily as a result of the continued operation of rent control. When one refers to the

existence of a housing shortage in 1980, what is really meant is a relative absence of apartments in neighborhoods people would prefer at prices they would like to pay.[25] Thus, an emergency of the type created by the exigencies of war is not present, and a continued routine declaration of emergency, based merely on the longstanding existence of an inflationary economy and relatively low vacancy rates, can no longer be used to justify the continuation of rent control in New York City.[26]

As the Florida Supreme Court observed,

> An increase in the cost-of-living (an inflationary spiral) alone is not a justification for rent control which limits the amount of rent which a tenant may be required to pay. *Chastleton Corp.* v. *Sinclair,* 264 U.S. 543.

City of Miami Beach v. *Fleetwood Motel, Inc.,* 261 So.2d 801, 804 (Fla. 1972). In *Warren* v. *City of Philadelphia,* 387 Pa. 362, 127 A.2d 703 (1956), the Supreme Court of Pennsylvania heard evidence that the existence of a 3–5% vacancy rate in Philadelphia's rental housing was "normal." Noting that "[o]rdinary conditions or customary existing conditions are not emergencies," the court then held that

> [the] evidence clearly establish[ed] that no emergency housing shortage existed in Philadelphia which would have justified the enactment of the Rent Control Ordinance in question, and that the evidence was therefore sufficient to overcome the presumption

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[25] See Levy, "Rent Control in New York City: Another Look," 47 N.Y.S.B.J. 193 (1975).

[26] See also, Note, "Emergency Tenant Protection in New York: Ten Years of Rent Stabilization," 7 Fordham Urb. L.J. 305, 307 (1979) (housing surplus in New York City in the mid-1960's).

> of validity and justified the conclusion of law that the . . . ordinance . . . was invalid, arbitrary, and void.

Id. at 705, 706. New York City's vacancy rate for apartments, though under 5% since the late 1960's, could also be said to be "normal." As a result, the *Fleetwood Hotel* and *Warren* cases indicate that the existence of a vacancy rate of less than 5%, and inflationary rent increases, both relied on by the State Legislature and the City Council as a justification for continued operation of rent control, do not constitute an "emergency." Because there is no proof that "a social emergency, caused by an insufficient supply of dwelling houses and apartments, *so grave* that it constitute[s] a serious menace to the health, morality, comfort, and even to the peace of a large part of the people of the State" now exists in New York City, the New York rent statutes are constitutionally deficient. *Edgar A. Levy Leasing Co.* v. *Siegal,* 258 U.S. at 245 (emphasis added).

The *second* respect in which New York's scheme of rent control and rent stabilization is distinguishable from earlier rent laws upheld by this Court is its *de facto* permanent nature. Landowners in the city have now been continuously subject to controls for 37 years. As the Temporary Commission on City Finances observed in its Fifteenth Interim Report to the Mayor in June 1977, on "The Effects of Rent Control and Rent Stabilization in New York City," p. 47: "Introduced in 1943, the present rent controls have been perpetuated as a permanent institution on legal grounds that appear increasingly dubious and an economic rationale that largely has eroded." (R. 154.)

This extended operation of New York's rent laws is an exercise of the police power which is violative of the Fourteenth Amendment. In *Block* v. *Hirsh,* 256 U.S. at 135, this Court held that the District of Columbia's rent control statute "is put and justified only as a temporary measure. [Citation omitted.] A limit in time, to tide over a passing trouble, well may justify a

law that could not be upheld as a permanent change."[27] When New York State first assumed jurisdiction over the City's rent control laws, it was the intent of the State Legislature "[to move] ahead from a controlled to uncontrolled housing market as fairly and speedily as possible." Kristof, *Rent Control Within the Rental Housing Parameters of 1975* 10 (1975), *quoting* Governor Harriman, *Message to the State Legislature*, Jan. 20, 1955. However, the fact that every three years since then the rent laws have been renewed as a matter of course on the basis of *pro forma* legislative declarations that an "emergency" continues to exist indicates that this goal has vanished from sight. Realistically speaking, therefore, New York City's rent laws cannot pass constitutional muster as a "temporary measure."[28] Had the New York Court of Appeals been willing to give sufficient weight to the holdings of this Court, it would have concluded that the "mere passage of time" renders the extended operation of these rent laws constitutionally invalid.

In discussing the standard which a court should use in reviewing a declaration of emergency legislation, this Court has stated that "A Court is not at liberty to shut its eyes to an obvious mistake, when the validity of the law depends upon the truth of what is declared." *Chastleton Corp.* v. *Sinclair*, 264 U.S. at 547. Thus, the decision of the New York Court of Appeals in establishing a presumption which makes it virtually impossible to show the actual facts with respect to New York City's rent laws was erroneous and should be reversed by this Court.

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[27] In *Marcus Brown Co.* v. *Feldman, supra*, the Court indicated that the District's rent laws would be in effect for only two years.

[28] *Cf. District of Columbia* v. *Washington House Ownership Council, Inc.*, 415 A.2d 1349 (D.C. 1980), in which the District of Columbia Court of Appeals held that "when the [D.C.] Council . . . enacts legislation in response to emergency circumstances, ... that act 'shall be effective for a period not to exceed 90 days,' and the Council has no authority to pass another substantially identical emergency act in response to the same emergency."

II. The New York City Rent Laws Constitute a Taking Without Just Compensation in Violation of the Fifth and Fourteenth Amendments.

As an entirely separate matter, appellants have also contended that the New York rent laws amount to an unconstitutional taking of their property without just compensation.[29] The New York Court of Appeals dismissed this argument, holding that the facts alleged in the complaint and affidavits, even if assumed to be true did "not establish that any property of any individual property owner has been 'taken'." (App. A., *infra,* at p. 2a.) This conclusion, however, overlooks the fact that the appellants, in their suit, are not seeking damages for past takings of specific properties, but, on the contrary, are endeavoring to bar the continued operation of the New York laws in view of their unconstitutional administration and operation, and their inevitable effect on all landowners, but particularly and clearly on the appellants here.[30]

Although it has long been recognized that under some circumstances rent laws could violate the just compensation clause of the Constitution,[31] "[t]he question of what [government actions] constitute a 'taking' for purposes of the Fifth Amendment has proved to be a problem of considerable difficulty." *Penn Central Transportation Co.* v. *New York City,*

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[29] Even if this Court held that New York's rent laws do not violate appellants' due process rights, that conclusion would have no bearing on the question whether a "taking" had occurred. As this Court said in *Kaiser Aetna* v. *United States,* 444 U.S. 164, 174, that "is an entirely separate question."

[30] *Cf. Assn. of Data Processing Service Organization* v. *Camp,* 397 U.S. 150; *United States* v. *SCRAP,* 412 U.S. 669, 683-690.

[31] In *Block* v. *Hirsch, supra,* Mr. Justice Holmes said (256 U.S. at 156):

> For just as there comes a point at which the police power ceases and leaves only that of eminent domain, it may be conceded that [rent] regulations of the present sort pressed to a certain height might amount to a taking. . . .

438 U.S. 104, 123. In spite of the absence of a clear constitutional standard in this area, considerations which this Court has taken into account in its recent just compensation clause decisions show that a "taking without just compensation" has occurred in this instance.

This Court has rejected the proposition that a "taking" can never occur unless physical control of one's property has been transferred to the government. *Kaiser Aetna* v. *United States,* 444 U.S. at 174, n. 8. This Court has also declared that—

> the Fifth Amendment's guarantee . . . [is] designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole. *Armstrong* v. *United States,* 364 U.S. 40, 49 (1960).

Penn Central Transportation Co. v. *New York City, supra,* at 123-24. In developing this "fairness" standard, the Court has identified three factors which are relevant in determining whether a "taking" exists—namely, the "economic impact of the regulation, its interference with reasonable investment backed expectations, and the character of the governmental action." *Kaiser Aetna* v. *United States, supra,* 444 U.S. at 175. An examination of New York City's rent laws in light of these considerations clearly indicates that a violation of the taking clause has occurred.

First, with respect to the economic impact of the rent control and rent stabilization statutes, New York City owners are each year receiving $275 million less than the amount which is needed to maintain the housing units which they own. See *Housing and Development Administration* v. *Community Housing Improvement Program, Inc.,* 83 Misc.2d 977, 374 N.Y.S.2d 520 (Civ. Ct. N.Y. 1975), *rev'd on other grounds,* 90 Misc.2d 813, 396 N.Y.S.2d 125 (App. Term), *aff'd,* 59 A.D.2d 773, 398 N.Y.S.2d 520 (App. Div. 1977). Moreover, New York's rent

laws have resulted in an income transfer of over $20 billion to tenants by virtue of the fact that owners are receiving far less than the fair rental value for their properties. This substantial reduction in the stream of income which flows to the owners of rental housing in New York City has resulted in the decrease in the value of these rent controlled apartment buildings as reflected in the lower tax assessments on such housing (R.85-86), the significant number of tax delinquencies and abandonments which occur each year (R. 71-72, 75-79), and the consequential erosion of the city's real estate tax base. (R. 82-84.)

As this Court recognized in *Pennsylvania Coal Co.* v. *Mahon,* 260 U.S. 393, 413, "Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law." But when the diminution reaches the magnitude which it has in this case, amounting to $1.5 billion in assessed value in two years alone, a "taking" results and "there must be an exercise of eminent domain and compensation to sustain the act." *Id.*

Second, closely related to the economic impact of these laws is the extent to which they have interfered with the owners' investment-backed expectations. In this regard, the Court's inquiry has focused on an individual's ability to obtain a "reasonable return" on his investment. *See, e.g., Penn Central Transportation Co.* v. *New York, supra,* at 136. New York City's rent control and rent stabilization laws were originally designed to permit owners to collect rents sufficient to provide revenues for adequate operations and maintenance, and to provide them with a rate of return competitive with that available from other investments. In practice, however, appellants have been deprived of this fundamental element of their property rights.[32]

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[32] Since the term "property" as used in the taking clause has been construed by this Court to encompass the entire "group of rights inhering in the citizen's [ownership]," the ability to earn a reasonable return constitutes a recognizable property interest. *See United States* v. *General Motors Corp.,* 323 U.S. 373.

New York City's Rent Agency has permitted rent increases of 7½% annually (until the MBR ceiling is reached) for rent controlled units, and the Rent Guidelines Board has generally allowed owners to charge from 4 to 8½% more for one-year lease rentals in their rent stabilized apartments. As appellants have alleged, however—and this is admitted on this record—these increases have not kept pace with the owners' rising costs. For example, appellees have refused to allow the owners to pass along fuel cost increases of over 600%. As already stated, these limitations on the owners' ability to increase rents have created a $750-800 million annual gap between what owners may charge and what they should be receiving. In addition, the Administrator of the Housing and Development Administration stated in a report that the increasing number of abandonments and foreclosures of apartment buildings in New York City are due, in large part, to the fact that under rent control many owners are actually losing money, and are unable to obtain revenues sufficient to meet operating and maintenance costs. (R.71.) One study cited by appellants, for example, has estimated that up to 80 percent of rent-controlled and rent-stabilized properties are forced to operate at a net loss. (R. 123.) These assertions, which must be accepted as true for purposes of this case, clearly establish that plaintiffs have not been able to obtain a "reasonable return" on their investments.

Even if these minimal annual rent increases are deemed not to be confiscatory by this Court, the systematic delays of the City agencies which administer rent control in granting rent increases required by statute transform what otherwise might have been a lawful exercise of the police power into an unconstitutional "taking." The New York Court of Appeals stated that it knew of "no authority ... recognizing any proposition that proof of maladministration or nonadministration of a statute may serve as the predicate for a judicial declaration that the statute is unconstitutional." (App. A., *infra,* at p. 2a.) This Court, however, has long held that statutes and regulations constitutional on their face may be administered in an unconstitutional way. *Boddie* v. *Connecticut,* 401 U.S. 371;

Snowden v. *Hughes,* 321 U.S. 1. Several other state courts have also found that excessive delays in acting upon applications for rate increases constitute "takings." In *Birkenfeld* v. *City of Berkeley, supra,* the Supreme Court of California, quoting this Court in *Smith* v. *Illinois Bell Telephone Co.,* 270 U.S. 587, 591, held that "[p]roperty may be as effectively taken by long-continued and unreasonable delay in putting an end to confiscatory rates as by an express affirmance of them." *Id.* at 169, 550 P.2d at 1030, 130 Cal. Rptr. at 465. The court concluded:

> For . . . rent ceilings of indefinite duration an adjustment mechanism is constitutionally necessary to provide for changes in circumstances and also provide for the . . . situations in which the base rent cannot reasonably be deemed to reflect general market conditions. The mechanism is sufficient for the required purpose only if it is capable of providing adjustments in maximum rents without a substantially greater incidence and degree of delay than is practically necessary.

Id. Accord, Helmsley v. *Borough of Fort Lee,* 78 N.J. 200, 394 A.2d 65 (1978); *Apartment and Office Building Association* v. *Washington,* 343 A.2d 323 (D.C. 1975).

In the present case appellants point to numerous instances in which appellees have purposely delayed the upward adjustment of MBR ceilings and failed to process rent increase applications. Moreover, they have also referred to a long list of prior cases in which the New York courts have been highly critical of the City's administration of the rent laws. These criticisms were effectively summarized by one such court in *Housing and Development Administration* v. *Community Housing Improvement Program,* 90 Misc.2d 813, 396 N.Y.S.2d 125, 126 (App. Term. 1977) ("*HDA* v. *CHIP*"):

> Evidence was submitted to the court below establishing a total breakdown in the administration of

> rent control and rent stabilization. Protest and hardship applications are either not processed or are processed after a delay of up to three years. Landlords have had to go to court and force the City to issue [maximum base rent] orders which the City is required to issue under the applicable laws. To make matters worse, these orders are hopelessly outdated by the time they are issued.

When years of delay or total inaction in processing rent increase applications have become the rule rather than the exception,[33] appellants are deprived of a return which can meet current expenses and produce a fair profit. As a result, New York City's rent laws, as administered, have substantially interfered with the owners' reasonable investment-backed expectations.

The *third* relevant factor which this Court has advanced has been the character of the governmental action. In this respect, governmental actions which may be characterized as "a physical invasion by the government" or "acquisitions of resources to permit or facilitate uniquely public functions" have been more likely to be "takings" than actions which "adjust the benefits and burdens of economic life to promote the common good." *Penn Central Transportation Co.* v. *New York, supra.*

Zoning laws and other land use regulations are the classic example of statutes which have been upheld as being reasonably related to the promotion of the general welfare. *See, e.g., Agins* v. *City of Tiburon,* No. 79-602, decided June 10, 1980; *Village of Euclid* v. *Ambler Realty Co.,* 272 U.S. 365. New York's rent laws, however, differ from typical zoning laws in one fundamental respect. Zoning laws may have a more severe impact on some landowners than others, but all members of the

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[33] *HDA* v. *CHIP,* 83 Misc.2d 977, 374 N.Y.S.2d 520, 528 (Civ. Ct. N.Y. 1975), *rev'd on other grounds,* 90 Misc.2d 813, 396 N.Y.S.2d 125 (App. Term. 1977), *aff'd,* 59 A.D.2d 773, 398 N.Y.S.2d 520 (App. Div. 1977).

community benefit to some extent from the restrictions which have been imposed.[34] In the case of rent control, however, owners as a class who have been forced, in effect, to subsidize the residents of their buildings to the extent of over $20 billion since rent control first went into effect in New York City can in no way be said to derive any benefit from these laws.

Instead, New York's system of rent control and rent stabilization is more closely akin to a "physical invasion." Rent control has resulted in the inability of many owners to pay the real estate taxes on their rental properties, and the consequent compulsory transfer of titles of such buildings to the City through *in rem* foreclosures. (R.72.) Furthermore, if an owner is to make use of his property in the manner for which it is suited, he must permit his tenants to reside in housing which he provides at much less than the fair rental value of his apartments. This Court has recognized that interference with an owner's right to exclude others constitutes a "taking" when permitting others to come onto the land "will unreasonably impair the value or use of that property." *Pruneyard Shopping Center* v. *Robbins,* No. 79-289, decided June 9, 1980, slip op. pp. 6-8; *Kaiser Aetna* v. *United States, supra.* It would require little, if any, extension of this reasoning to conclude that New York City's rent laws, which prevent owners from receiving a reasonable return when they permit others to live in their apartment buildings, also constitutes a "taking without just compensation."

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[34] *E.g., Agins* v. *City of Tiburon, supra,* slip op. p. 6. *Cf. Penn Central Transp. Co.* v. *New York, supra* (New York's Landmarks Law provides both economic and aesthetic benefits to all New York citizens and all buildings).

CONCLUSION

A decision by this Court in this case is necessary to protect the property rights of many New York land owners against governmental actions which in their operation and effect violate the due process and just compensation provisions of the Fifth and Fourteenth Amendments to the United States Constitution. The issues presented by this appeal are substantial and merit plenary consideration by this Court.

Probable jurisdiction should be noted.

Respectfully submitted,

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October, 1980

APPENDIX A

Memorandum Opinion of the New York Court of Appeals, June 26, 1980

State of New York Court of Appeals

MEMORANDUM

BENSON REALTY CORP., et al.,
Appellants,

v.

ABRAHAM BEAME, as Mayor of the
City of New York, et al.,
Respondents.

(366) Wynne B. Stern Jr., NY City, for appellants.
Arthur Kass, Harry Michelson, & Ester Niderberg,
NY City, for respondent City.
Robert Abrams, Attorney-General
(Daniel M. Cohen & Shirley Adelson Siegel of counsel)
for respondent State.

MEMORANDUM

The order of the Appellate Division should be modified by substituting for its declaration and dismissal the declaration that the New York City Rent Control Law is constitutional, and as so modified the order should be affirmed.

While we agree that plaintiffs have not rebutted the presumption of constitutionality, the consequence of that failure is that defendants are entitled to a declaration of constitutionality (*Lanza* v. *Wagner,* 11 NY2d 317, 334).

Plaintiffs attack the New York City Rent Control Law on the grounds that there is no longer an emergency after 36 years, that as applied it is confiscatory, and that in any event there has been such a failure of administration of the law as to mandate its being declared unconstitutional. The need for rent control has been re-examined legislatively at intervals of three years, the most recent such review being the March 27, 1980 Report of the New York State Temporary Commission on Rental Housing, which concluded that "There is a need for continuing a

form of rent regulation in those jurisdictions in which housing accommodations are presently subject to rent control or rent stabilization." Whether there is need for controls is a matter for legislative determination in the first instance. The presumption of a factual basis for that determination is not overcome by mere passage of time, nor have plaintiffs, whose affidavits concentrate on the effect of controls on property owners, presented evidence to demonstrate beyond a reasonable doubt that there is no factual basis.

On the question of unconstitutional taking it need only be noted that plaintiffs' papers contain only generalized conclusions which, however persuasive in the forum of public opinion, do not establish that the property of any individual property owner has been "taken" or demonstrate, sufficiently to overcome the presumption of constitutionality, that rent control is the cause of what plaintiffs claim is the present plight of New York City landlords.

With respect to the claimed collapse in administration, we reject it without pausing to inquire whether or to what extent appellants might be able to demonstrate delays or breakdowns. We know of no authority, and appellants cite none, recognizing any proposition that proof of maladministration or nonadministration of a statute may serve as the predicate for a judicial declaration that the statute is unconstitutional. The role of the judiciary is to enforce statutes and to rule on challenges to their constitutionality either on their face or as applied in accordance with their provisions. Any problems that result from pervasive nonenforcement are political questions for the solution of which recourse would have to be had to the legislative or executive branches; the judiciary has neither the authority nor the capabilities for their resolution.

* *

Order modified, with costs to defendants, in accordance with the memorandum herein and, as so modified, affirmed. All concur.

Decided June 26, 1980

APPENDIX B

Order and Opinion of the Appellate Division, Second Department, November 13, 1979

ORDER OF APPELLATE DIVISION
SECOND DEPARTMENT
Dated November 13, 1979

A: Term of the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department, held in Kings County on November 13, 1979.

BENSON REALTY CORP., et al.,
Appellants-Respondents,

v.

Order on Appeals from Order.

ABRAHAM BEAME, as Mayor, et al.,
Respondents-appellants.

In the above entitled cause, *inter alia,* to declare the New York City Rent Control Law unconstitutional, the above named Benson Realty Corp. et al., plaintiffs, and the above named Abraham Beame, as Mayor, et al., defendants, having appealed to this court from an order of the Supreme Court, Kings County, dated October 18, 1978, which, *inter alia,* denied their respective cross motions for summary judgment; and the said appeals having been argued by Wynne B. Stern, Jr., Esq., of counsel for the appellants-respondents, argued by Arthur Kass, Esq., of counsel for the City respondents-appellants and argued by Daniel M. Cohen, Esq., of counsel for the respondent-appellant Heimann and for Robert Abrams, Attorney General, *pro se,* pursuant to Executive Law, § 71 and CPLR 1012 (subd [b]), due deliberation having been had thereon; and upon this court's opinion and decision slip heretofore filed and made a part hereof, it is

ORDERED that the order appealed from is hereby modified, on the law, by deleting the fourth and fifth decretal paragraphs thereof and substituting therefor provisions (1) declaring that plaintiffs have failed to submit sufficient evidence to rebut the presumption that the laws in question are constitutional and

(2) otherwise dismissing the complaint; and, as so modified, the said order is unanimously affirmed, with one bill of $50 costs and disbursements jointly to defendants appearing separately and filing separate briefs.

Enter:

Clerk of the Appellate Division.

DECISION OF APPELLATE DIVISION

SECOND DEPARTMENT

Dated November 13, 1979

VINCENT D. DAMIANI, J.P.
GUY J. MANGANO
SAMUEL RABIN
FRANK A. GULOTTA, JJ.

____ AD2d ____ A—October 23, 1979

2040 E Benson Realty Corp. et al., appellants-respondents, v. Abraham Beame, as Mayor of the City of New York, et al., respondents-appellants.

Fellner, Rovings & Gallay, New York, N.Y. (Wynne B. Stern, Jr. and Gary E. Peterson of counsel), for appellants-respondents.

Harry Michelson, New York, N.Y. (Arthur Kass and Esther Niderberg of counsel), for the City respondents-appellants.

Robert Abrams, Attorney-General, New York, N.Y. (Daniel M. Cohen of counsel), for respondent-appellant Heimann, and *pro se* pursuant to Executive Law, § 71 and CPLR 1012 (subd [b]).

In an action *inter alia* to declare the New York City Rent Control Law unconstitutional, the parties cross-appeal from an order of the Supreme Court, Kings County (MORTON, J.), dated October 18, 1978, which, *inter alia,* denied their respective cross motions for summary judgment.

Order modified, on the law, by deleting the fourth and fifth decretal paragraphs thereof and substituting therefor provisions (1) declaring that plaintiffs have failed to submit sufficient evidence to rebut the presumption that the laws in question are constitutional and (2) otherwise dismissing the complaint. As so modified, order affirmed, with one bill of $50 costs and disbursements payable jointly to defendants appearing separately and filing separate briefs.

All parties to this matter request that a declaration as to constitutionality be made upon the instant record. In our opinion, plaintiffs have failed to set forth sufficient facts to rebut the presumption of constitutionality.

DAMIANI, J.P., MANGANO, RABIN and GULOTTA, JJ., concur.

November 13, 1979 BENSON RALTY CORP. v. BEAME
2040 E

APPENDIX C

Decision of the Supreme Court of New York, Kings County, September 14, 1979

MEMORANDUM

SUPREME COURT: KINGS COUNTY
(SPECIAL TERM, PART I)

DECISION OF HON FRANKLIN W. MORTON, JR. DATED SEPTEMBER 14, 1978

BENSON REALTY CORP., et al.

VS.

ABRAHAM BEAME, as Mayor of the City of New York et al.

By Morton,

Dated September 14, 1978

Index Number
14556/1977

In this action for declaratory and injunctive relief that the New York City Rent Control Law (7 New York City Administrative Code, § Y51-1.0 et seq., p 472 et seq.) and Rent Stabilization Law (7 New York City Administrative Code, § YY51-1.0 et seq., p. 531 et seq.) be declared unconstitutional, plaintiffs move for a preliminary injunction, summary judgment, and class action status. The Attorney General of the State of New York, on behalf of defendant Heimann, and all of the other defendants collectively each cross-moved to dismiss the complaint and to declare these laws constitutional.

This lawsuit had its genesis in a Civil Court proceeding in which the defendants therein raised as a defense the constitutionality of the two laws (*Housing and Development Administration of the City of New York* v. *Community Housing Improvement Program, Inc.* [hereinafter, *HDA* v. *CHIP*], 83 Misc 2d 977, 979-980). After conducting several hearings, the Civil Court in a decision dated September 9, 1975 found that the rent control and rent stabilization laws had become unconstitutional as administered and declared them to be unconstitutional (*supra,* p 986). The Appellate Term, Second Department, in a memorandum decision of January 26, 1977 reversed this holding on the ground that the Civil Court lacked jurisdictional authority to declare these laws unconstitutional (*HDA* v. *CHIP,* 90 Misc 2d 813, 815). On October 31, 1977

the Appellate Division, Second Department, affirmed "on the opinion rendered by the Appellate Term herein" (*HDA* v. *CHIP*, 59 AD2d 773).

In its decision, the Appellate Term said:

> "Notwithstanding the finding of no jurisdiction in the Civil Court and the reluctance with which courts of original jurisdiction should treat constitutional issues * * * we are of the opinion that based on the evidence submitted, that the findings and conclusions of the court below are persuasive and merit further consideration in an appropriate forum" (citations omitted) *HDA* v. *CHIP*, 90 Misc 2d 815, *supra*).

In *obiter dictum* the court then went on to express the opinion that evidence submitted to the court below established a total breakdown of rent control and rent stabilization and suggested that the Legislature "take whatever steps are necessary to remedy the administrative morass that now passes itself off as 'rent control administration' " (*HDA* v. *CHIP*, 90 Misc 2d 815-816, *supra*).

(Parenthetically, it should be noted that neither the prior holding of the Civil Court which the Appellate Term reversed nor the *dicta* of the Appellate Term is to be considered, as plaintiffs assert in their complaint, *res judicata* of the issues presented in the instant action).

The Supreme Court being the "appropriate forum" in which to bring an action for a declaratory judgment (CPLR 3001), the plaintiffs subsequently commenced the within lawsuit on July 26, 1977 seeking solely a declaration that the rent control and rent stabilization laws and regulations be held unconstitutional, each on the dual grounds (1) that these laws, as now constituted, deprive the plaintiffs (and others similarly situated) of their property rights without due process of law and in violation of their rights to equal protection of the laws and (2) that the laws as administered and/or applied are unconstitutional for the same reasons.

Based solely on the various affidavits supporting plaintiffs' motion, this court finds that the plaintiffs make a persuasive case as to the infirmities of rent control. (Rent stabilization, although generally considered and dicussed in conjunction with rent control in the affidavits, received scant separate treatment of its own disabilities). However, the court does not believe that the present validity of the rent control and rent stabilization laws, after having been sustained over a period of years (*Matter of Hartley Holding Corp.* v *Gable,* 13 NY2d 306; *Plaza Mgt Co* v *City Rent Agency,* 25 NY2d 630; *8200 Realty Corp* v *Lindsay,* 27 NY2d 124), should now be decided on the basis of papers alone (see *Defiance Milk Products Co* v *Du-Mond,* 282 App Div 977, 978). Moreover, there are mixed questions of law and fact which render summary disposition of this case at this time inappropriate. Defendants are entitled to a plenary trial to present evidence refuting plaintiffs' contentions that the laws can no longer be sanctioned as temporary emergency measures after years of continuous controls, and that the statutes *per se* and in the way they are being administered operate to constitutionally deprive the plaintiffs of their property rights. The parties should also have an opportunity to present the consequences that could or would result to the more than one million tenants who would allegedly be affected by a declaration of unconstitutionality.

Accordingly, that branch of plaintiffs' motions for summary judgment is denied.

Although the plaintiffs request a preliminary injunction pending the determination of this action, they have not adequately addressed themselves to the need for *immediate pendente lite* relief. The court further finds that the granting of such an injunction, preventing in effect the enforcement and administration of rent control and rent stabilization for only a temporary period of time, is not in the public interest as it would create an irreparably chaotic situation in the housing field. Under the principle of balancing the equities and finding that greater harm will result to the defendants and to the

general public from the imposition of injunctive relief than would ensue to the plaintiffs if the injunction were not issued (*Gilbert* v *Burnside,* 6 AD2d 834, 835 [2d Dept]; *Western New York Motor Lines Inc* v *Rochester-Genesee Regional Transportation Authority,* 72 Misc 2d 712, 717; 7A Weinstein-Korn-Miller, NY Civ Prac, ¶¶ 6301.20 and 6301.21), the preliminary injunction is accordingly denied.

The last branch of plaintiffs' motion requests a determination that this lawsuit be maintained as a class action on behalf of themselves and all other owners of controlled and rent stabilized apartments and others similarly situated. Defendants oppose this relief on the ground that class action status is inappropriate in proceedings against a governmental agency. Since there is no disputing the fact that rent control and rent stabilization are governmentally operated and administered by City agencies, defendants' position must be sustained under the principle recently adopted by the Court of Appeals that:

> " 'where governmental operations are involved, and where subsequent petitioners will be adequately protected under the principle of *stare decisis* (*Matter of Revera* v *Trimarco,* 36 NY2d 747), we are of the opinion that class action relief is not necessary' (*Matter of Jones* v *Berman,* 37 NY2d 42, 57)" (*Matter of Martin* v *Levine,* 39 NY2d 72, 75).

This prescript should be particularly true here since a finding of unconstitutionality would render the statutory scheme null and void for all members of the class alleged herein.

Accordingly, class action certification is denied.

The defendants' cross motions seek both a dismissal of the complaint and an affirmative finding of constitutionality of the various issues involved herein. As discussed above, an adjudication of the merits of rent control and rent stabilization must await the trial of this action and will not be decided on these motions. The fact that these laws have been previously held

constitutional (see, supra) is not necessarily dispositive of the issues herein. Controls over residential housing and rents have been justified as a temporary emergency measure (*Lincoln Bldg. Associates* v *Barr,* 1 NY2d 413, 420; *I.L.F.Y. Co.* Temporary State Housing Rent Comm., 10 NY2d 263, 268; McKinney's Uncons Laws of NY, Local Emergency Housing Rent Control Act, § 8602 [Legislative finding]; 7 New York City Administrative Code, Rent Control Law § Y51-1.0 [Declaration and findings]; 7 New York City Administrative Code, Rent Stabilization Law, § YY51-1.0 [Findings and declarations of emergency]). Whether this justification continues to have any validity is one of the primary issues to be determined since the plaintiffs' allegation that the laws result in an unconstitutional taking of their property may well be dependent on the emergency need for these statutes today. As the Court of Appeals has said, first about business rent control and later about residential rent control:

> "Rent controls, all will agree, ought not achieve a status of permanence in our economy. They have no justification except in periods of emergency * * * Whether and for how long the Legislature may lawfully continue Office Rent Control must, and shall, be a question open for future review" (citations omitted). (*Lincoln Bldg Associates* v *Barr,* 1 NY2d at 420, supra).

> "Appellant does not dispute the continuance of the housing emergency which is predicate for these housing rent control laws. It cannot deny that prohibitions against rent increases may in an emergency be constitutional although they reduce the value of the property regulated and they deprive its owner of what otherwise would be considered a fair return (citations omitted)." (I.L.F.Y. Co v Temporary State Housing Rent Comm., 10 NY2d at 268, supra).

In a case involving emergency housing controls in Washington, D.C., the United States Supreme Court sustained the regulatory statute on the ground that a "public exigency will justify the legislature in restricting property rights in land to a certain extent without compensation" (*Block* v *Hirsh*, 256 US 135, 156). The court, in the person of Mr. Justice Holmes, also stated that:

> "The regulation is put and justified only as a temporary measure. * * * A limit in time, to tide over a passing trouble, well may justify a law that cannot be upheld as a permanent change" (citations omitted) (supra p 157)

In addition to the issue of whether the rent control and rent stabilization laws continue to have any justification and validity, the second constitutional question raised herein—whether the laws are unconstitutional as administered—has not been previously adjudicated.

The contention of the Attorney General of the State of New York that the complaint should be dismissed as against defendant Heimann because New York State has no involvement in the City Rent Control and Stabilization Laws is without merit. Rent control is primarily a matter of State concern (*City of New York* v *State of New York*, 67 Misc 2d 513, affd 31 NY2d 804) and it is the State's enabling legislation — Housing Rent Control Act (McKinney's Uncons Laws § 8601 as amended in 1974)—which gave New York City the authority to enact the present rent control and rent stabilization laws. The constitutionality of all these statutes is the subject of this lawsuit, and New York State is clearly a proper and necessary party herein.

Accordingly, the defendants' cross motions are denied in all respects.

Although the court has denied all of the relief requested herein, there is no disputing, and the court so takes judicial

notice of, the dilapidated condition and abandoned status of too much of the housing stock in New York City, undoubtedly due in small or large part to the existence of rent control. An early resolution of the constitutional issues presented in this action is therefore both desirable and important to the plaintiffs and others similarly situated as well as to the City and its residents. Accordingly, the court directs that the parties proceed expeditiously to trial, and that upon the filing of a statement of readiness and note of issue, the calendar clerk shall place this matter at the head of the appropriate trial calendar.

Settle order.

J.S.C.

NOTICE OF APPEAL
THE SUPREME COURT OF THE UNITED STATES

Received September 10, 1980
Court of Appeals

NOTICE OF APPEAL

STATE OF NEW YORK
COURT OF APPEALS

No. 366

Kings County Clerk's Index No. 14556/1977

BENSON REALTY CORP., CHAI ASSOCIATES, INC., HINCKLEY REALTY CORP., 516 EAST 168TH ST. CORP., ROBERT BEREZIN, SHIRLEY BEREZIN, MORRIS FADER, ANITA FADER, COMMUNITY HOUSING IMPROVEMENT PROGRAM, INC., BRONX REALTY ADVISORY BOARD, INC., ASSOCIATED BUILDERS & OWNERS OF GREATER NEW YORK, INC., AND ON BEHALF OF ALL OTHERS SIMILARY SITUATED,

Plaintiffs-Appellants,

-against-

ABRAHAM BEAME, AS MAYOR OF THE CITY OF NEW YORK, THOMAS APPELBY, AS ADMINISTRATOR OF THE HOUSING AND DEVELOPMENT ADMINISTRATION OF NEW YORK CITY, DANIEL W. JOY, AS COMMISSIONER OF THE DEPARTMENT OF RENT AND HOUSING MAINTENANCE OF NEW YORK CITY, JOHN G. HEIMANN, AS COMMISSIONER OF THE NEW YORK STATE DIVISION OF HOUSING & COMMUNITY RENEWAL AND CITY RENT AGENCY,

Defendant-Appellees.

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that the plaintiffs-appellants hereby appeal to the Supreme Court of the United States from the final order and judgment of the Court of Appeals of the State of New York entered in this action on June 26, 1980, which final

order and judgment modified the order of the Appellate Division, Second Judicial Department by substituting for its declaration and dismissal the declaration that the New York City Rent Control Law is constitutional and so modified affirming said order dismissing the complaint.

This appeal is from every part of said final order and judgment, and it is taken pursuant to 28 U.S.C. §1257(2).

FELLNER, ROVINS & GALLAY, PC
Counsel for Plaintiffs-Appellants
Office and Post Office Address:
New York, New York 10017

TO: THE CLERK OF THE COURT OF APPEALS
The Clerk of the Appellate Division—
Second Judicial Department,
The Clerk of the Supreme Court
County of Kings,

Robert Abrams, Esq.
Attorney General of the State of New York
Harry Michaelson, Esq.

APPENDIX D

New York State Statutes and New York City Code Provisions

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2. Emergency Tenant Protection Act of 1974 ..... 20a
3. New York City Rent and Rehabilitation Law, as Amended 25a
4. New York City Rent Stabilization Law of 1969, as Amended 34a

APPENDIX D

NEW YORK STATE STATUTES AND NEW YORK CITY CODES PROVISIONS

Local Emergency Housing Rent Control Act, As Amended
McKinney's Consolidated Laws of New York—Book 65 (Unconsolidated Laws)

§ 8602. *Legislative finding*

The legislature hereby finds that a serious public emergency continues to exist in the housing of a considerable number of persons in the state of New York which emergency was created by war, the effects of war and the aftermath of hostilities; that such emergency necessitated the intervention of federal, state and local government in order to prevent speculative, unwarranted and abnormal increases in rents; that there continues to exist an acute shortage of dwellings; that unless residential rents and evictions continue to be regulated and controlled, disruptive practices and abnormal conditions will produce serious threats to the public health, safety and general welfare; that to prevent such perils to health, safety and welfare, preventive action by the legislature continues to be imperative; that such action is necessary in order to prevent exactions of unjust, unreasonable and oppressive rents and rental agreements and to forestall profiteering, speculation and other disruptive practices tending to produce threats to the public health; that in order to prevent uncertainty, hardship and dislocation, the provisions of this section are necessary and designed to protect the public health, safety and general welfare, that the transition from regulation to a normal market of free bargaining between landlord and tenant, while still the objective of state policy, must be administered with due regard for such emergency; and that the policy herein expressed should now be administered locally within cities having a population of one million or more by an agency of the city itself.

L.1962, c. 21 § 1(2)

§ 8603. *Local determination as to continuation of emergency*

The continuation, after May thirty-first, nineteen hundred sixty-seven, of the public emergency requiring the regulation and control of residential rents and evictions within cities having a population of one million or more shall be a matter for local determination within each such city. Any such determination shall be made by the local legislative body of such city on or before April first, nineteen hundred sixty-seven and at least once in every third year thereafter following a survey which the city shall cause to be made of the supply of housing accommodations within such city, the condition of such accommodations and the need for continuing the regulation and control of residential rents and evictions within such city. Such survey shall be submitted to such legislative body not less than thirty nor more than sixty days prior to the date of any such determination.

L.1962, c.21, § 1(3); amended L.1963, c.393, § 1; L.1965, c. 318, § 1; L.1966, c. 13, § 1; L.1967, c.657, § 1.

§ 8604. *Establishment of city housing rent agency*

On or before April first, nineteen hundred sixty-two; the mayor of each city having a population of one million or more shall establish or designate an official, bureau, board, commission or agency of such city (referred to in this section as the "city housing rent agency") to administer the regulation and control of residential rents and evictions within such city unless such city, acting through its local legislative body, shall have enacted, prior to April first, nineteen hundred sixty-two, a local law or ordinance pursuant to [Section 8605], prescribing a different method of establishing or designating a city housing rent agency and in such case such agency shall be established or designated in accordance with said local law or ordinance.

L.1962, c. 21, § 1(4).

§ 8605. *Authority for local rent control legislation*

Each city having a population of one million or more, acting through its local legislative body, may adopt and amend local laws or ordinances in respect of the establishment or designation of a city housing rent agency. When it deems such action to be desirable or necessitated by local conditions in order to carry out the purposes of this [act] such city, except as hereinafter provided, acting through its local legislative body and not otherwise, may adopt and amend local laws or ordinances in respect of the regulation and control of residential rents, including but not limited to provision for the establishment and adjustment of maximum rents, the classification of housing accommodations, the regulation of evictions, and the enforcement of such local laws or ordinances. The validity of any such local laws or ordinances, and the rules or regulations promulgated in accordance therewith, shall not be affected by and need not be consistent with the state emergency housing rent control law or with rules and regulations of the state division of housing and community renewal.

Notwithstanding any local law or ordinance, housing accommodations which became vacant on or after July first, nineteen hundred seventy-one or which hereafter become vacant shall be subject to the provisions of the emergency tenant protection act of nineteen seventy-four, provided, however, that this provision shall not apply or become effective with respect to housing accommodations which, by local law or ordinance, are made directly subject to regulation and control by a city housing rent agency and such agency determines or finds that the housing accommodations became vacant because the landlord or any person acting on his behalf, with intent to cause the tenant to vacate, engaged in any course of conduct (including but not limited to, interruption or discontinuance of essential servies) which interfered with or disturbed or was intended to interfere with or disturb the comfort, repose, peace or quiet of the tenant in his use or occupancy of the housing accommodations. The removal of any housing accommodation from

regulation and control of rents pursuant to the vacancy exemption provided for in this paragraph shall not constitute or operate as a ground for the subjection to more stringent regulation and control of any housing accommodation in such property or in any other property owned by the same landlord, notwithstanding any prior agreement to the contrary by the landlord.

Notwithstanding the foregoing, no local law or ordinance shall hereafter provide for the regulation and control of residential rents and eviction in respect of any housing accommodations which are (1) presently exempt from such regulation and control or (2) hereafter decontrolled either by operation of law or by a city housing rent agency, by order or otherwise. No housing accommodations presently subject to regulation and control pursuant to local laws or ordinances adopted or amended under authority of this [section] shall hereafter be by local law or ordinance or by rule or regulation which has not been theretofore approved by the state commissioner of housing and community renewal subjected to more stringent or restrictive provisions of regulation and control than those presently in effect.

Notwithstanding the foregoing, no local law or ordinance shall subject to such regulation and control any housing accommodation which is not occupied by the tenant in possession as his primary residence; provided, however, that such housing accommodation not occupied by the tenant in possession as his primary residence shall continue to be subject to regulation and control as provided for herein unless the city housing rent agency issues an order decontrolling such accommodation, which the agency shall do upon application by the landlord whenver it is established by any facts and circumstances which, in the judgment of the agency, may have a bearing upon the question of residence, that the tenant maintains his primary residence at some place other than at such housing accommodation.

L.1962, c. 21, § 1(5); amended L.1971, c. 371, § 6; L.1971, c. 372, § 1; L.1971, c. 373, § 2; L.1971, c. 1012, § 1. As amended L.1974, c. 576, § 2.

§ 8606. *Succession of city agency to state rent control functions within city*

All the functions and powers possessed by and all the obligations and duties of the temporary state housing rent commission and the state rent administrator under the provisions of the state emergency housing rent control law and the rules and regulations of the commission thereunder, insofar as they relate to the regulation and control of residential rents and evictions within a city having a population of one million or more, shall be transferred to the city housing rent agency of such city on May first, nineteen hundred sixty-two, subject to the provisions of any local laws, ordinances, rules or regulations adopted pursuant to this [section or section 8605]. On and after such date, and until the adoption of a local law or ordinance in respect of the regulation and control of residential rents within such city pursuant to subdivision five of this section, such city housing rent agency is hereby authorized and empowered, from time to time, to adopt, promulgate, amend or rescind rules, regulations and orders under the state emergency housing rent control law and the validity of such rules, regulations and orders shall not be affected by and need not be consistent with the rules, regulations and orders of the temporary state housing rent commission under such law. All acts, orders, determinations, decisions, rules and regulations of the temporary state housing rent commission relating to the regulation and control of residential rents and eviction within such city which are in force at the time of such transfer shall continue in force and effect as acts, orders, determinations, decisions, rules and regulations of such city housing rent agency until duly modified, superseded or abrogated pursuant to such local laws, ordinances, rules or regulations.

L.1962, c. 21 § 1(6).

Emergency Tenant Protection Act Of Nineteen Seventy-Four, As Amended McKinney's Consolidated Laws of New York — Book 65 (Unconsolidated Laws—Pocket Part Supplement)
§ 8622. *Legislative finding*

The legislature hereby finds and declares that a serious public emergency continues to exist in the housing of a considerable number of persons in the state of New York which emergency was at its inception created by war, the effects of war and the aftermath of hostilities, that such emergency necessitated the intervention of federal, state and local government in order to prevent speculative, unwarranted and abnormal increases in rents; that there continues to exist in many areas of the state an acute shortage of housing accommodations caused by continued high demand, attributable in part to new household formations and decreased supply, in large measure attributable to reduced availability of federal subsidies, and increased costs of construction and other inflationary factors; that a substantial number of persons residing in housing not presently subject to the provisions of the [state] emergency housing rent control law or the local emergency housing rent control act are being charged excessive and unwarranted rents and rent increases; that preventive action by the legislature continues to be imperative in order to prevent exaction of unjust, unreasonable and oppressive rents and rental agreements and to forestall profiteering, speculation and other disruptive practices tending to produce threats to the public health, safety and general welfare; that in order to prevent uncertainty, hardship and dislocation, the provisions of this act are necessary and designed to protect the public health, safety and general welfare; that the transition from regulation to a normal market of free bargaining between landlord and tenant, while the ultimate objective of state policy, must take place with due regard for such emergency; and that the policy herein expressed shall be subject to determination of the existence of a public emergency requiring the regulation of residential rents within any city, town or village by the local legislative body of such city, town or village.

L.1974, c. 576, § 4.

§ 8623. *Local determination of emergency; end of emergency*

a. The existence of public emergency requiring the regulation of residential rents for all or any class or classes of housing accommodations heretofore destablized; heretofore or hereafter decontrolled, exempt, not subject to control, or exempted from regulation and control under the provisions of the [state] emergency housing rent control law, the local emergency housing rent control act or the New York city rent stabilization law of nineteen hundred sixty-nine; or subject to stabilization or control under such rent stabilization law, shall be a matter for local determination within each city, town or village. Any such determiniation shall be made by the local legislative body of such city, town or village. Any such determination shall be made by the local legislative body of such city, town or village on the basis of the supply of housing accommodations within such city, town or village, the condition of such accommodations and the need for regulating and controlling residential rents within such city, town or village. A declaration of emergency may be made as to any class of housing accommodations if the vacancy rate for the housing accommodations in such class within such municipality is not in excess of five percent and a declaration of emergency may be made as to all housing accommodations if the vacancy rate for the housing accommodations within such municipality is not in excess of five percent.

b. The local governing body of a city, town or village having declared an emergency pursuant to subdivision a of this section may at any time, on the basis of the supply of housing accommodations within such city, town or village, the condition of such accommodations and the need for continued regulation and control of residential rents within such municipality, declare that the emergency is either wholly or partially abated or that the regulation of rents pursuant to this act does not serve to abate such emergency and thereby remove one or more classes of accommodations from regulation under this act. The

emergency must be declared at an end once the vacancy rate described in subdivision a of this section exceeds five percent.

c. No resolution declaring the existence or end of an emergency, as authorized by subdivisions a and b of this section, may be adopted except after public hearing held on not less than ten days public notice as the local legislative body may reasonably provide.

L.1974, c. 576, § 4.

§ 8624. *Establishment of rent guidelines boards; duties*

c. In a city having a population of one million or more, the rent guidelines board shall be the rent guidelines board established pursuant to the New York city rent stabilization law of nineteen hundred sixty-nine as amended, and such board shall have the powers granted pursuant to the New York city rent stabilization law of nineteen hundred sixty-nine, as amended.

L.1974, c.576, § 4; Amended L.1976, c. §486, § 1; L.1979, c. 348, § 1; L.1979, c. 349, § 1.

§ 8625. *Housing accommodations subject to regulation*

a. A declaration of emergency may be made pursuant to section [8623] as to all or any class or classes of housing accommodations in a municipality, except:

(1) housing accommodations subject to the [state] emergency housing rent control law, or the local emergency housing rent control act, other than housing accommodations subject to the New York city rent stabilization law of nineteen hundred sixty-nine;

(2) housing accommodations owned or operated by the United States, the state of New York, any political subdivision, agency or instrumentality thereof, any municipality or any public housing authority;

(3) housing accommodations in buildings in which rentals are fixed by or subject to the supervision of the state division of

housing and community renewal under other provisions of law or the New York city department of housing preservation and development or the New York state urban development corporation, or, to the extent that regulation under this act is inconsistent therewith aided by government insurance under any provision of the National Housing Act;

(4)(a) housing accommodations in a building containing fewer than six dwelling units;

(b) for purposes of this paragraph four, a building shall be deemed to contain six or more dwelling units if it is part of a multiple family garden-type maisonette dwelling complex containing six or more dwelling units having common facilities such a sewer line, water main or heating plant and operated as a unit under common ownership, notwithstanding that certificates of occupancy were issued for portions thereof as one-or-two-family dwellings.

(5) housing accommodations in buildings completed or buildings substantially rehabilitated as family units on or after January first, nineteen hundred seventy-four;

(6) housing accommodations owned or operated by a hospital, convent, monastery, asylum, public institution, or college or school dormitory or any institution operated exclusively for charitable or educational purposes on a non-profit basis;

(7) rooms or other housing accommodations in hotels, other than hotel accommodations in cities having a population of one million or more not occupied on a transient basis and heretofore subject to the emergency housing rent control law, the local emergency housing rent control act or to the New York city rent stabilization law of nineteen hundred sixty-nine;

(8) any motor court, or any part thereof, any trailer, or trailer space used exclusively for transient occupancy or any part thereof; or any tourist home serving transient guests exclusively, or any part thereof;

The term "motor court" shall mean an establishment renting rooms, cottages or cabins, supplying parking or storage facilities for motor vehicles in connection with such renting and other services and facilities customarily supplied by such establishments, and commonly known as motor, auto or tourist court in the community.

The term "tourist home" shall mean a rooming house which caters primarily to transient guests and is known as a tourist home in the community.

(9) non-housekeeping, furnished housing accommodations, located within a single swelling unit not used as a rooming or boarding house, but only if:

(a) no more than two tenants for whom rent is paid (husband and wife being considered one tenant for this purpose), not members of the landlord's immediate family, live in such dwelling unit, and

(b) the remaining portion of such dwelling is occupied by the landlord or his immediate family.

(10) housing accommodations in buildings operated exclusively for charitable purposes on a non-profit basis;

(11) housing accommodations which are not occupied by the tenant in possession as his primary residence.

L.1974, c. 576, § 4; Amended L.1978, c. 655, § 137.

§ 8626. *Regulation of rents*

a. Notwithstanding the provisions of any lease or other rental agreement, no owner shall, on or after the first day of the first month or other rental period following a declaration of emergency pursuant to section [8623] which date shall be referred to in this act as the local effective date, charge or collect any rent in excess of the initial legal regulated rent or adjusted initial legal regulated rent until such time as a different legal regulated rent shall be authorized pursuant to guidelines adopted by a rent guidelines board pursuant to section four.

c. The initial legal regulated rents for housing accommodations in a city having a population of one million or more shall be the initial rent established pursuant to the New York city rent stabilization law of nineteen hundred sixty-nine as amended.

L.1974, c. 576, c. 576, § 4.

New York City Rent And Rehabilitation Law As Amended
McKinney's Consolidated Laws of New York—Book 65 (Unconsolidated Laws)

SECTION Y51-1.0 *Declaration and findings*

a. The council hereby finds that a serious public emergency continues to exist in the housing of a considerable number of persons in the city, which emergency was created by war, the effects of war and the aftermath of hostilities; that such emergency necessitated the intervention of federal, state and local government in order to prevent speculative, unwarranted and abnormal increases in rents; that there continues to exist an acute shortage of dwellings; that unless residential rents and evictions continue to be regulated and controlled, disruptive practices and abnormal conditions will produce serious threats to the public health, safety and general welfare; that to prevent such perils to health, safety and welfare, preventive action through enactment of local legislation by the council continues to be imperative; that such action, as a temporary measure to be effective until it is determined by the council that such emergency no longer exists, is necessary in order to prevent exactions of unjust, unreasonable and oppressive rents and rental agreements and to forestall profiteering, speculation and other disruptive practices tending to produce threats to the public health; that the transition from regulation to a normal market of free bargaining between landlord and tenant, while still the objective of state and city policy, must be administered with due regard for such emergency; that in order to prevent uncertainty, hardship and dislocation, the provisions of this title are declared to be necessary and designed to protect the public health, safety and general welfare.

b. The council further declares that it is city policy to utilize the powers conferred by this title, in a manner consistent with the purposes and provisions thereof, to encourage and promote the improvement and rehabilitation of the housing accommodations subject to control hereunder, for the purpose of protecting the public health, safety and general welfare.

SECTION Y51-5.0 *General Powers and Duties of the City Rent Agency Rehabilitation Administration*

a. (1) At the time this title shall become effective, the city rent agency shall establish maximum rents which, subject to the provisions of subdivision b of this section, shall be the maximum rents in effect on April thirtieth, nineteen hundred sixty-two pursuant to the state rent act and the regulations thereunder.

(2)(a) Nothwithstanding the foregoing provision of this subdivision, and except as provided in subparagraph (b) of this paragraph (2), effective August first, nineteen hundred seventy, the maximum rent in effect on July thirty-first, nineteen hundred seventy shall be adjusted as follows:

(i) For any individual housing accommodation for which one or more but less than two full fifteen per centum rent increases has been granted since May first, nineteen hundred fifty-three pursuant to former subparagraph (d) of paragraph (1) of subdivision g of this section the maximum rent shall be increased by eight per centum.

(ii) For any individual housing accommodation for which no full fifteen per centum rent increase has been granted since May first, nineteen hundred fifty-three pursuant to former subparagraph (d) of paragraph (1) of subdivision g of this section the maximum rent shall be increased by fifteen per centum, except that if there was no such increase for any individual housing accommodation for which a first rent was established pursuant to former subdivision m of this section after July thirty-first, nineteen

hundred sixty-five and before August first, nineteen hundred sixty-eight, the maximum rent shall be increased by five per centum and except that if there was no increase for any individual housing accommodation for which a first rent was established pursuant to such subdivision on or after August first, nineteen hundred sixty-eight there shall be no increase in maximum rent.

On or after August first, nineteen hundred seventy, a landlord may file application for labor cost rent adjustment pursuant to subparagraph (1) of paragraph (1) of subdivision g of this section. In lieu of such labor cost rent adjustment, the landlord of a building with twenty or fewer housing accommodations shall have the option of filing for a five per centum increase in maximum rent for any individual housing accommodation for which two or more full fifteen per centum increases have been granted since May first, nineteen hundred fifty-three pursuant to former subparagraph (d) of paragraph (1) of subdivision g of this section.

Nothing contained in this subparagraph (a) however, shall have the effect of establishing the maximum rent in an amount less than the maximum rent in effect on July thirty-first, nineteen hundred seventy nor of increasing by more than fifteen per centum the maximum rent for any housing accommodation.

(b) Where the maximum rent in effect on July thirtyfirst, nineteen hundred seventy for any individual housing accommodation is less than sixty dollars per month such rent shall be increased effective August first, nineteen hundred seventy by ten dollars per month where the housing accommodation is comprised of three rooms or less and by fifteen dollars per month where the housing accommodation is comprised of more than three rooms.

(c) Where a lease is in effect for any housing accomodation on August first, nineteen hundred seventy, no adjustment of maximum rent for such accommodation shall become

effective until the expiration of such lease. Where a housing accommodation becomes vacant on or after August first, nineteen hundred seventy and before January first, nineteen hundred seventy-two by voluntary surrender of possession by the tenant the maximum rent shall be increased by no more than fifteen per centum over the maximum rent established for such accommodation at the time the vacancy occurred, provided that a report is filed with the city rent agency as prescribed by its regulations. If the city rent agency shall make a finding of harassment in violation of subdivision d of section Y51-10.0 of this title for the purpose of obtaining such a vacancy, in addition to all other civil or criminal penalties, injunctive relief and enforcement remedies authorized by section Y51-11.0 of this title, no housing accommodation in the building shall thereafter be entitled to the benefit of a rental increase as a result of becoming vacant between the aforesaid dates.

(d) The total of (i) the increase pursuant to subparagraph (a) of this paragraph, of (ii) any increases granted between December thirty-first, nineteen hundred sixty-nine and December thirty-first, nineteen hundred seventy-one pursuant to subparagraph (a), (b), or (c) of paragraph (1) of subdivision g of this section and (iii) any increase granted on or after the effective date of this paragraph pursuant to subparagraph (1) of paragraph (1) of subdivision g of this section shall not exceed fifteen per centum of the "1970 base rent." For purposes of this subparagraph, the "1970 base rent" is the maximum rent on July thirty-first, nineteen hundred seventy minus the amount of any increase granted between December thirty-first, nineteen hundred sixty-nine and July thirty-first, nineteen hundred seventy pursuant to subparagraph (a), (b), or (c) of paragraph (1) of subdivision g of this section. This subparagraph shall not operate to decrease any maximum rent existing on its effective date.

(e) The rent increases provided for in this paragraph (2) shall be collectible upon the landlord's filing a report with the

city rent agency on forms to be prescribed by such agency, including simplified forms for landlords of buildings with twelve or fewer housing accommodations, and giving such notice to the tenant as such agency may prescribe, subject to adjustment upon order of the city rent agency. The report shall contain a certified statement by the landlord that there is no legally habitable rent controlled housing accommodation in the building which has not been rented for a period of six months or more on the date of the filing of such report, or that if there is such a housing accommodation, the reason it has not been rented is that it is being altered pursuant to a permit issued by the department of buildings no later than three months after the vacancy commenced and that the alteration is of such a nature that the accommodation must be kept vacant while it is being made or for such other cause found by the city rent agency not to be inconsistent with the purpose of this title, provided further that in the case of an alteration it is commenced within sixty days from the issuance of said permit. A copy of the permit and the application therefor shall accompany the report. No report shall be accepted for filing and no rent increase provided for in this paragraph (2) shall be collected in the absence of any such certified statement by the landlord. Any excess shall be credited to the tenants in full commencing with the rental payment following the receipt by the landlord of such order of adjustment. If such report is filed on or before October thirty-first, nineteen hundred seventy, the increase shall take effect August first, nineteen hundred seventy. If the report is filed thereafter, such increase shall take effect with the first rental payment following filing.

(f) The rent increases provided for in this paragraph (2) shall not be collected for the period between March thirty-first, nineteen hundred and seventy-one and December thirty-first, nineteen hundred seventy-one until the landlord shall have filed with the city rent agency a certified statement attesting that for every month for which he has received a rent increase pursuant to subparagraphs (a) and (b) of this paragraph (2),

he has expended or incurred in the operation, maintenance and improvements of the housing accommodations from which increases were collected an amount which equals the amount expended per month for such purpose averaged over the preceding five years, or such lesser period that he has been landlord of such properties, plus ninety per centum of all increased rents so collected.

(3) The city rent agency shall establish maximum rents to be effective January first, nineteen hundred seventy-two by dividing the maximum gross building rental from all housing accommodations in the property whether or not subject to or exempt from control under this title by the number of such accommodations, after giving consideration to such factors as may be prescribed by formula, such as size and location of housing accommodations and number of rooms. Such maximum gross building rental shall be computed on the basis of real estate taxes, water rates and sewer charges and an operation and maintenance expense allowance, a vacancy allowance not in excess of two per cent, and a collection loss allowance, both as prescribed by such agency, and an eight and one half per centum return on capital value. The operating and maintenance expense allowance shall include provision for the cost of fuel, utilities, payroll, maintenance repairs, replacement reserves and miscellaneous charges attributed to the property, excluding mortgage interest and amortization, and may be varied by the agency for different types of properties depending upon such factors as the year of construction, elevator or non-elevator buildings, the average number of rooms per individual housing accommodations in the building. Capital value shall be equalized assessed valuation as established pursuant to article 12-A of the real property tax law. Where the property receives income from sources other than such housing accommodations, the taxes, water and sewer charges and the capital value attributed to the portion consisting of housing accommodations shall be in the same ratio of the total taxes, water and sewer charges (where not computed separately) and the

total capital value as the gross income from such portion consisting of housing accommodations bears to the total gross income from the property, as prescribed by the agency.

The agency shall report to the council on or before October fifteenth, nineteen hundred seventy-one as to the status of preparation of the formulas necessary to implement the rent adjustments to be effective January first, nineteen hundred seventy-two.

(4) Where a maximum rent established pursuant to this title on or after January first, nineteen hundred seventy-two is higher than the previously existing maximum rent, the landlord may not collect more than seven and one-half per centum increase from a tenant in occupancy on such date in any one year period, provided however the maximum collectible rent under paragraphs (3) and (4) of this subdivision a, shall be no greater than seven and one-half per centum over the rent the landlord was entitled to receive as of December 31, 1972. Where the period for which the maximum rent is established exceeds one year, regardless of how the collection thereof is averaged over such period, the rent the landlord shall be entitled to receive during the first twelve months shall not be increased by more than seven and one-half per centum over the previous rent. Notwithstanding any of the foregoing limitations in this paragraph (4), maximum rent shall be increased if ordered by the agency pursuant to subparagraphs (d), (e), (f), (g), (h), (i), (k), (l), or (m) of paragraph (1) of subdivision (g) of this section. On or after Jamuary 1, 1974, maximum rent shall be increased if ordered by the agency only pursuant to subparagraphs (a), (d), (e), (f), (g), (h), (i), (k), (l), or (m) of paragraph (1) of subdivision g of this section.

(5) [Expired]

(6) Where a new maximum rent has been established pursuant to former subdivision m of this section or, following the repeal of such subdivision, pursuant to subparagraph (m) of paragraph (1) of subdivision g of this section, a new

maximum rent shall not be established pursuant to paragraph (3) of this subdivision. Except with respect to a housing accommodation to which the preceding sentence applies, where the maximum rent on December thirty-first, nineteen hundred seventy-one is higher than the maximum rent established pursuant to paragraph (3) of this subdivision, such prior maximum rent shall continue in effect until the maximum rent under paragraph (3), as adjusted from time to time pursuant to the provisions of this title, shall equal or exceed such prior maximum rent, at which time the maximum rent for such housing accommodation shall be as prescribed in this title.

(7) Notwithstanding the provisions of this title, upon the sale in any manner authorized by law of a multiple dwelling which was previously subject to the provisions of such title and which was acquired by the city in a tax foreclosure proceeding or pursuant to article nineteen-A of the real property actions and proceedings law, for a dwelling unit which was subject to this title pursuant to the local emergency housing rent control act at the time the city so acquired title is occupied by a tenant who was in occupancy at the time of acquisition and remains in occupancy at the time of sale, the maximum rent shall be the last rent charged by the city, or on behalf of the city, for such dwelling unit, which rent shall not exceed the rent computed pursuant to paragraph (3) of this subdivision, computed as of the time of such sale. This paragraph shall not apply to redemptions from city ownership pursuant to title D of chapter seventeen of the administrative code.

(8) The city rent agency, prior to establishing biennially maximum base rents pursuant to this title and before establishing a maximum base rent which is different from the previously existing maximum base rent for dwellings covered by this law, shall hold a public hearing or hearings for the purpose of collecting information the city rent agency may consider in establishing maximum base rents. Notice of the date, time, location and summary of subject matter for the

public hearing or hearings shall be published in the City Record for a period of not less than fourteen days, and at least once in one or more newspapers of general circulation at least fourteen days immediately preceding each hearing date, at the expense of the city of New York, and the hearing shall be open for testimony from any individual, group, association or representative thereof who wants to testify.

b. Such agency, to effectuate the purposes of this title, and in accordance with the standards set forth in paragraph (2) of subdivision c of this section, may set aside and correct any maximum rent resulting from illegality, irregularity in vital matters or fraud, occurring prior to or after May first, nineteen hundred sixty-two.

c. (1) Whenever such agency determines that such action is necessary to effectuate the purposes of this title, it may also establish maximum rents for housing accommodations to which this title applies, where no maximum rent with respect thereto was in effect on April thirteenth, nineteen hundred sixty-two, or where no registration statement had been filed with respect thereto as required by the state rent act, or where for any other reason the provisions of subdivision a of this section are not susceptible of application to any such housing accommodations.

(2) Such rents shall be established, having regard for the maximum rents for comparable housing accommodations or any other factors bearing on the equities involved, consistent with the purposes of this title.

g. (1) The city rent agency may from time to time adopt, promulgate, amend or rescind such rules, regulations and orders as it may deem necessary or proper to effectuate the purposes of this title, including practices relating to recovery of possession; provided that such regulations can be put into effect without general uncertainty, dislocation and hardship inconsistent with the purposes of this title; and provided further that such regulations shall be designed to maintain a system of rent controls at levels which, in the judgment of such agency, are

generally fair and equitable and which will provide for an orderly transition from and termination of emergency controls without undue dislocations, inflationary price rises or disruption. Provision shall be made, pursuant to regulations prescribed by such agency, for individual adjustment of maximum rents where:

> (a) The rental income from a property yields a net annual return of less than six per centum of the valuation of the property.
>
> (b) Where a building contains no more than nineteen rental units and the landlord has not been fully compensated by increases in rental income sufficient to offset unavoidable increases in property taxes, fuel, utilities, insurance and repairs and maintenance, excluding mortgage interest and amortization, and excluding allowance for depreciation, obsolescence and reserves, which have occurred since the federal date determining the maximum rent . . .

As amended Loc. L. 1974, No. 17, June 11; Loc. L. 1974, No. 51, Dec. 31; Loc. L. 1975, No. 27, June 2; Loc. L. 1978, c. 133, §1; Loc. L. 1979, No. 14, Apr. 19; Loc. L. 1979, No. 31, June 22.

New York City Rent Stabilization Law Of Nineteen Hundred Sixty-Nine As Amended McKinney's Consolidated Laws of New York—Book 65 (Unconsolidated Laws)

SECTION YY51-1.0 *Findings and declaration of emergency*

The Council hereby finds that a serious public emergency continues to exist in the housing of a considerable number of persons within the city of New York which emergency was created by war, the effects of war and the aftermath of hostilities; that such emergency necessitated the intervention of federal, state and local government in order to prevent speculative, unwarranted and abnormal increases in rents; that there

continues to exist an acute shortage of dwellings; that unless residential rents and evictions continue to be regulated and controlled, disruptive practices and abnormal conditions will produce serious threats to the public health, safety and general welfare; that to prevent such perils to health, safety and welfare, preventive action by the Council continues to be imperative; that such action is necessary in order to prevent exactions of unjust, unreasonable and oppressive rents and rental agreements and to forestall profiteering, speculation and other disruptive practices tending to produce threats to the public health, safety and general welfare; that the transition from regulation to a normal market of free bargaining between landlord and tenant, while still the objective of state and city policy, must be administered with due regard for such emergency; and that the policy herein expressed is now administered locally within the city of New York by an agency of the city itself, pursuant to the authority conferred by chapter twenty-one of the laws of nineteen hundred sixty-two.

The Council further finds that many owners of housing accommodations in multiple dwellings not subject to the provisions of the city rent and rehabilitation law, enacted pursuant to said enabling authority, either because they have been constructed since nineteen hundred forty-seven or because they were decontrolled due to monthly rental of two hundred fifty dollars or more or for other reasons are demanding exorbitant and unconscionable rent increases as a result of the aforesaid emergency which has led to a continuing restriction of available housing, as evidenced by the 1968 vacancy survey by the United States Bureau of the Census; that such increases are being exacted under stress of prevailing conditions of inflation and of an acute housing shortage resulting from a sharp decline in private residential construction brought about by a combination of local and national factors; that such increases and demands are causing severe hardship to tenants of such accommodations and are uprooting long-time city residents from their communities; that unless such accommodations are subjected to

reasonable rent and eviction limitations, disruptive practices and abnormal conditions will produce serious threats to the public health, safety and general welfare; and that such conditions constitute a grave emergency.

SECTION YY51-1.0.1 *Additional findings and declaration of emergency*

The Council hereby finds that a serious public emergency continues to exist in the housing of a considerable number of persons within the city of New York and will continue to exist after April first nineteen hundred seventy-nine, and hereby reaffirms and repromulgates the findings and declaration setforth in section YY51-1.0 of this title.

Added Loc.L.1979, No. 8, Apr. 1.

SECTION YY51-3.0 *Application*

This law shall apply to

a. Class A multiple dwellings not owned as a cooperative or as a condominium, containing six or more dwelling units which:

(1) were completed after February first, nineteen hundred forty-seven, except dwelling units (a) owned or leased by, or financed by loans from, a public agency or public benefit corporation, (b) subject to rent regulation under the private housing finance law or any other state law, (c) aided by government insurance under any provision of the National Housing Act, to the extent this local law or any regulation or order issued thereunder is inconsistent therewith, or (d) located in a building for which a certificate of occupancy is obtained after March tenth, nineteen hundred sixty-nine; or (e) any class A multiple dwelling which on June first, nineteen hundred sixty-eight was and still is commonly regarded as a hotel, transient hotel or residential hotel, and which customarily provides hotel service such as maid service, furnishing and laundering of linen, telephone and bell boy service, secretarial

or desk service and use and upkeep of furniture and fixtures; or (2) were decontrolled by the city rent agency pursuant to section Y51-12.0 of the city rent and rehabilitation law; or (3) are exempt from control by virtue of items(1), (2), (6) or (7) of subparagraph (i) of paragraph 2 of subdivision e of section Y51-3.0 of such law; and

b. Other housing accommodations made subject to this law pursuant to the emergency tenant protection act of nineteen seventy-four.

As amended L.1974, c. 576 § 7.

SECTION YY51-3.1 *Application to multiple family complex*

For purposes of this title a class A multiple dwelling shall be deemed to include multiple family garden-type maisonette dwelling complex containing six or more dwelling units having common facilities such as sewer line, water main, and heating plant, and operated as a unit under a single ownership on May sixth, nineteen hundred sixty-nine, notwithstanding that certificates of occupancy were issued for portions thereof as one- or two-family dwellings.

SECTION YY51-3.3 *Application to certain multiple dwellings purchased from the city*

a. Notwithstanding the provisions of any local law or regulation promulgated pursuant to the rent stabilization or the emergency tenant protection act, upon the sale in any manner authorized by law of a multiple dwelling which was previously subject to the provisions of any such laws or acts which was acquired by the city in a tax foreclosure proceeding or pursuant to article nineteen-A of the real property actions and proceedings law, all dwelling units within the multiple dwelling shall be subject to rent stabilization law of nineteen hundred sixty-nine, as amended, at the last rent charged by the city, or on behalf of the city, for such dwelling unit.

b. If a unit which was subject to this title at the time the city so acquired, title is occupied by a tenant who was in occupancy at the time of acquisition and remains in occupancy at the time of sale, such tenant shall be offered a one, two or three year lease at the rent provided in this section as soon as practical at the sale of the multiple dwelling.

c. This section shall not apply to redemptions from city ownership pursuant to title D of chapter seventeen of the administrative code.

Added Loc.L.1979, No. 14, Apr. 19.

SECTION YY51-4.0 *Stabilization of rents*

a. Dwelling units covered by this law as provided in section YY51-3.0 or section YY51-3.1 shall be deemed to be housing accommodations subject to control under the provisions of title Y of chapter fifty-one of the administrative code notwithstanding any provision of such title to the contrary, unless the owner of such units is a member in good standing of any association registered with the housing and development administration pursuant to section YY51-6.0 or section YY51-6.1. For the purposes of this law a "member in good standing" of such an association shall mean an owner of a housing accommodation subject to this law who joined such an association within thirty days of its registration with the housing and development administration or within thirty days after becoming such owner or within sixty days after such housing accommodation becomes subject to regulation pursuant to the emergency tenant protection act of nineteen seventy-four, whichever is later, provided such accommodations were not under actual control of the city rent agency when he became the owner thereof, and further provided such owner complies with prescribed levels of fair rent increases established under this law or with guidelines for rent adjustments authorized pursuant to the emergency tenant protection act of nineteen seventy-four and this law, does not violate any order of the conciliation and

appeals board and is not found by the conciliation and appeals board to have harassed a tenant to obtain vacancy of his housing accommodation.

b. In the event that such dwelling units shall be subject to control under the provisions of such title as provided in subdivision a, the city rent agency shall establish the maximum rent therefor on the basis of the rent charged on May thirty-first, nineteen hundred sixty-eight.

c. The housing and development administration shall have power to promulgate such rules and regulations as it may deem necessary for the effective implementation of this law.

As amended L.1974, c. 576, § 8.

SECTION YY51-5.0 *Rent guidelines board*

a. There shall be a rent guidelines board to consist of nine members, appointed by the mayor.

b. The rent guidelines board shall establish annually guidelines for rent adjustments, and in determining whether rents for housing accommodations subject to the emergency tenant protection act of nineteen seventy-four or this law shall be adjusted shall consider, among other things (1) the economic condition of the residential real estate industry in the affected area including such factors as the prevailing and projected (i) real estate taxes and sewer and water rates, (ii) gross operating maintenance costs (including insurance rates, cost of fuel and labor costs), (iii) costs and availability of financing (including effective rates of interest), (iv) over-all supply of housing accommodations and over-all vacancy rates, (2) relevant data from the current and projected cost of living indices for the affected area, (3) such other data as may be made available to it. Not later than July first of each year, the rent guidelines board shall file with the city clerk its findings for the preceding calendar year, and shall accompany such findings with a statement of the maximum rate or rates of rent adjustment, if any, for one or more classes of accommodations subject to this

law, authorized for leases or other rental agreements commencing during the next succeeding twelve months. Such findings and statement shall be published in the city record.

As amended L. 1974, c. 576, § 9.

SECTION YY51-6.0.1 *Stabilization provision*

a. No owner of property subject to this law shall charge or collect any rent in excess of the initial legal regulated rent or adjusted initial legal regulated rent until the end of any lease or other rental agreement in effect on the local effective date until such time as a different legal regulated rent shall be authorized pursuant to guidelines adopted by a rent guidelines board.

b. The initial regulated rent for housing accommodations subject to this law on the local effective date of the emergency tenant protection act of nineteen seventy-four or which become subject to this law thereafter, pursuant to such act, shall be:

(1) For housing accommodations which were regulated pursuant to this law or the city rent and rehabilitation law prior to July first nineteen hundred seventy-one, and which became vacant on or after such date and prior to the local effective date of the emergency tenant protection act of nineteen seventy-four, the rent reserved in the last effective lease or other rental agreement; provided that such initial rent may be adjusted on application of the tenant pursuant to subdivision b of section YY51-6.0.2 of this law.

(2) For housing accommodations which were regulated pursuant to the city rent and rehabilitation law on the local effective date of the emergency tenant protection act of nineteen seventy-four, and thereafter become vacant, the rent agreed to by the landlord and the tenant and reserved in a lease or provided for in a rental agreement; provided that such initial rent may be adjusted on application of the tenant pursuant to subdivision b of section YY51-6.0.2 of this law.

(3) For housing accommodations other than those described in paragraphs (1) and (2) of this section, the rent reserved in the last effective lease or other rental agreement.

c. With respect to accommodations for which the initial legal regulated rent is governed by paragraph two of subdivision b hereof, no increase of such initial legal regulated rent pursuant to annual guidelines adopted by the rent guidelines board shall become effective until the expiration of the first lease or rental agreement taking effect after the local effective date of the emergency tenant protection act of nineteen seventy-four, but in no event before one year after the commencement of such rental agreement.

d. With respect to accommodations, other than those referred to in subdivision c, for which a lease is entered into after the local effective date of the emergency tenant protection act of nineteen seventy-four, but before the effective date of the first guidelines applicable to such accommodations, the lease may provide for an adjustment of rent pursuant to such guidelines to be effective on the first day of the month next succeeding the effective date of such guidelines.

Added L.1974, c. 576, § 11.

No. 80-669

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

BENSON REALTY CORP., CHAI ASSOCIATES, INC., HINCKLEY REALTY CORP., 615 EAST 168TH ST. CORP., ROBERT BEREZIN, SHIRLEY BEREZIN, MORRIS FADER, ANITA FADER, COMMUNITY HOUSING IMPROVEMENT PROGRAM, INC., BRONX REALTY ADVISORY BOARD, INC., ASSOCIATED BUILDERS & OWNERS OF GREATER NEW YORK, INC., AND 383 EAST 17TH ST. INC., individually and on behalf of all others similarly situated,

Appellants,

against

EDWARD KOCH, AS MAYOR OF THE CITY OF NEW YORK, ANTHONY GLIEDMAN, AS ADMINISTRATOR OF THE HOUSING AND DEVELOPMENT ADMINISTRATION OF NEW YORK CITY, DANIEL W. JOY, AS COMMISSIONER OF THE DEPARTMENT OF RENT AND HOUSING MAINTENANCE OF NEW YORK CITY, JOSEPH B. GOLDMAN, AS COMMISSIONER OF THE NEW YORK STATE DIVISION OF HOUSING & COMMUNITY RENEWAL AND CITY RENT AGENCY,

Appellees.

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

MOTION TO DISMISS OR AFFIRM

HARRY MICHELSON
General Counsel
Rent Control Division, HPD
Attorney for Appellees
EDWARD KOCH, as Mayor of the City of New York,

ANTHONY GLIEDMAN, as Administrator of the Housing and Development Administration of New York City, and

DANIEL W. JOY, as Commissioner of the Department of Rent and Housing Maintenance of New York City
110 Church Street
New York, N.Y. 10007
212—566-5112

Questions Presented

1. Whether the New York Court of Appeals properly upheld the constitutionality of the New York City rent control laws against the attacks which pleaded no facts but instead relied on anti-rent control writings and opinions. The New York Court of Appeals properly held that the presumption of constitutionality was not overcome by argumentative opinions of rent control opponents. It held that the need for controls is a matter for legislative determination. There is no substantial federal question.

2. Whether constitutional objection to the administration of the rent control laws, as distinct from the law itself, is judicially cognizable. In the absence of any citation of judicial authority by the appellants in either their briefs or in answer to questions on oral argument, the Court of Appeals rejected this objection on the law without referring to the substantial factual refutation of these claims presented in an affidavit in opposition to appellants motion for summary judgment. There is no substantial federal question.

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No. 80-669

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

BENSON REALTY CORP., CHAI ASSOCIATES, INC., HINCKLEY REALTY CORP., 615 EAST 168TH ST. CORP., ROBERT BEREZIN, SHIRLEY BEREZIN, MORRIS FADER, ANITA FADER, COMMUNITY HOUSING IMPROVEMENT PROGRAM, INC., BRONX REALTY ADVISORY BOARD, INC., ASSOCIATED BUILDERS & OWNERS OF GREATER NEW YORK, INC., AND 383 EAST 17TH ST. INC., individually and on behalf of all others similarly situated,

Appellants,

against

EDWARD KOCH, AS MAYOR OF THE CITY OF NEW YORK, ANTHONY GLIEDMAN, AS ADMINISTRATOR OF THE HOUSING AND DEVELOPMENT ADMINISTRATION OF NEW YORK CITY, DANIEL W. JOY, AS COMMISSIONER OF THE DEPARTMENT OF RENT AND HOUSING MAINTENANCE OF NEW YORK CITY, JOSEPH B. GOLDMAN, AS COMMISSIONER OF THE NEW YORK STATE DIVISION OF HOUSING & COMMUNITY RENEWAL AND CITY RENT AGENCY,

Appellees.

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

MOTION TO DISMISS OR AFFIRM

Preliminary Statement

Appellees, other than the State Commissioner of Housing and Community Renewal who has moved separately, move to dismiss the appeal taken to this Court from the final

order and judgment of the Court of Appeals of the State of New York entered in this action on June 26, 1980, or in the alternative to affirm the said order.

Opinions Below

The New York Court of Appeals opinion is reported at 50 N Y 2d 994, 431 N.Y.S. 2d 475, *sub nom. Benson Realty Corp.* v. *Beame.* The Appellate Division opinion is reported at 72 A D 2d 758, 41 N.Y.S. 2d 826 and R-263. The decision at Special Term, Kings County is unreported, but is reproduced in the appellants' appendix (App. C., pp. 7a-13a).

Jurisdiction

Appellants claim that this Court may take jurisdiction pursuant to 28 U.S. Code, §§ 1357(2) and 2101(c). Although the appellants designate the judgment and order appealed from as final, it must be observed, at the outset, that the Court of Appeals declaration of constitutionality, contained in the order and judgment, stemmed from the Court's finding "that plaintiffs have not rebutted the presumption of constitutionality" predicated upon the Legislature's explicit finding with reference to the inadequate supply of residential housing accommodations (50 N Y 2d 994). Any element of finality in the order and judgment, therefore, appears to have stemmed from a failure of proof, a factual matter which does not merit review by this Court.

Statutes Involved

The New York City Administrative Code, Chapter 51, Title Y, §§ Y51-1.0-18.0, as amended (City Rent and Rehabilitation Law);

The New York City Administrative Code, Chapter 51, Title YY, §§ YY51-1.0-7.0, as amended (Rent Stabilization Law).

The foregoing are set forth only in part in Appellants' Appendix D and to some extent incorrectly.* They should be supplemented by the following legislative action which passed and extended the period of rent control after surveys, public hearings, and other legislative consideration of the continued need for rent control by reason of extreme shortage of housing:

(a) N.Y. City Council Res. 489 adopted March 27, 1979, finding continued need for rent control, City Council Minutes, pp. 594, 596 based on Committee on Housing & Buildings report, p. 593 and analytical report on census data by Professor Peter Marcuse, Council Minutes, Feb. 27, 1979, pp. 167-358.

(b) N.Y. City Council Res. 678A adopted March 30, 1976 finding continued need for rent control. City Council Minutes, pp. 394, 397, based on report of Comm. on General Welfare, Minutes, pp. 234, 235 and an analytical report on the census data by Dr. Lawrence N. Bloomberg, Minutes, pp. 237-394.

(c) N.Y. City Council Res. No. 1042 adopted March 29, 1973 finding continued need for rent control, Minutes, pp. 633, 634, 636, based on Report of Committee on Housing, Minutes, pp. 460, 461 and an

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* The correct text of the City Rent and Rehabilitation Law and the Rent Stabilization Law can be found in the New York City Charter and Code (William Press edition) pp. 472 through 551, and pocket supplement for 1979-1980, pp. 23 through 37; and in Rasch, New York City Rent Control (Lawyers Cooperative Pub. Co., 1973) pp. 343-414, 728-740, and 1980 pocket supplement pp. 26-40, 89-116.

analytical report of the census data by Dr. George Sternlieb, Minutes, pp. 461-633.

(d) N.Y. City Council Res. No. 68 adopted March 31, 1970 finding continued need for rent control. Minutes, pp. 1244, 1245, 1247, 1248 based on Report of Committee on Housing, pp. 1122, 1123 and an analytical report of the census data by Dr. Paul Niebanck, Minutes, pp. 1123 to 1244.

(e) N.Y. City Council Res. No. 831 adopted March 21, 1967 finding continued need for rent control. Minutes, pp. 802, 831 based on Report of Committee on General Welfare, pp. 801, 802 and a separately published analytical report of the census data by Dr. Chester Rapkin.

(f) New York City Council Resolution No. 704 adopted Jan. 28, 1964 finding continued need for rent control. City Council Minutes, pp. 146, 147, 148 based on Report of Committee on General Welfare, pp. 145, 146 and report by Administrator Hortense W. Gabel summarizing the Census Bureau findings, Council Minutes, Dec. 17, 1963, pp. 576, 577, 578, and a separately published report by Dr. Frank S. Kristof.

(g) New York Local Law 20 of 1962 to continue rent control under New York City auspices, as recommended by City Council, Committee on General Welfare report and passed by Council, City Council Minutes, April 10, 1962, pp. 700-706, 706-725.

(h) L. 1961, c. 337, § 1 extending rent control to June 30, 1963 and legislative report. McKinney's Sess. Law 1961, pp. 1971-1995.

(i) L. 1959, c. 695, § 1 extending rent control to June 30, 1961 and legislative report. McKinney's Sess. Law 1959, pp. 1826-1839.

(j) L. 1957, c. 755, § 1 extending rent control to June 30, 1959 and legislative report. McKinney's Sess. Laws 1957, pp. 1535-1549.

(k) L. 1955, c. 685, § 1 extending rent control to June 30, 1957 and legislative report. McKinney's Sess. Laws 1955, pp. 1543-1551.

(l) L. 1953, c. 321, § 1 extending rent control to June 30, 1955 and legislative report. McKinney's Sess. Laws 1953, pp. 1936-1948.

(m) L. 1951, c. 443, § 1 extending rent control to June 30, 1953 and legislative report. McKinney's Sess. Law 1951, pp. 1525-1532.

(n) L. 1950, c. 250, § 1 enacting rent control until June 30, 1962.

Background of Case

The N.Y. state legislature and the New York City Council have enacted and extended rent controls for very limited periods at least every two or three years for the last 30 years since federal controls lapsed. Since 1964, the New York City Council has periodically and consistently made careful findings of fact based on: (1) U.S. Census Bureau surveys which established the existence of an emergency situation caused by extreme scarcity of rental housing units; (2) scholarly analytical reports elaborating the Census Bureau housing surveys, and (3) open public hearings attended by hundreds of landlords and tenants. The police powers of the state have thus been invoked to protect the public welfare.

At all times the state and city rent control laws have provided a mechanism to provide rent increases sufficient to yield a minimum statutory return. For the last 10 years the city law guaranteed rents sufficient to cover expenses plus 8½ percent return on equalized assessed

valuation (equal to approximately 14.9 percent on the assessed value). There is no limit to rent increases which may be ordered if property is actually operating at a loss. No plaintiff claimed such losses or inability to obtain meaningful and prompt relief. The complaint in this action is the latest of perennial attacks on rent control instigated and financed by real estate interests. It claims that all the rent control statutes are unconstitutional. The critics of rent regulation marshalled by appellants in their papers blame those controls for the abandoned and deteriorating housing in N.Y.C., although similar conditions exist where there is no rent control.

The complaint also alleged that the statutes have been so poorly administered that the net effect was to deprive plaintiffs of the return on investment allowed by the statutes. The complaint does not support this bald allegation, even in prima facie fashion. The defendant city rent agency, on the other hand, showed: (1) that all of the complaints of inadequate administration referred to occurred in an unfortunate period, now long past; and (2) that currently, the agency timely and efficiently issues rent increase and other orders.

Plaintiffs' complaint is only a compendium of tired claims and political opinions opposed to retaining rent regulation in New York City rather than a legal pleading of facts which could prove unconstitutionality.

Appellants pointedly invite the courts to sit as a superlegislature to decide whether there is a housing shortage, and if so, what means are best suited to protect those adversely affected. We submit that this is not a proper judicial function, and that the refusal of the New York courts to do so does not raise any substantial federal question.

Prior Proceedings in This Case

A. The Pleadings and Motions

The action was commenced in July 1977, by service of a summons and complaint upon the defendants (R. 156-157). Plaintiffs were real estate trade organizations, and several individual and corporate landlords (R. 158-160).

The complaint demanded judgment granting a permanent injunction against defendants from continuing to enforce the City Rent Control Law and its State Enabling Act, the State Emergency Tenants Protection Act and the City Rent Stabilization Law, and declaring those laws to be unconstitutional. The complaint also demanded that plaintiffs be immediately allowed to collect an "economic rent" with provision for adjustments for fluctuation in operating and maintenance costs (R. 188). Apparently, plaintiffs intended to have the court substitute its own fashioned system of rent-control to replace the one designed by the legislature.

The defendants answered promptly (R. 209, 213), but the plaintiffs proceeded to do nothing further for almost a year. Then, in April, 1978, plaintiffs, believing there were no factual issues to be tried, moved for summary judgment (R. 21). Plaintiffs offered no factual matter in their moving papers. On affidavit relied basically on opinions in cases involving other matters (R. 24-50). Another affidavit by a trade association president quoted a variety of anti-rent control writings (R. 51-86). The third affidavit, by the president of a plaintiff corporation, made a similar argument predicated on newspaper clippings, and the like (R. 87-155).

The defendant city rent agency, cross-moved for summary judgment to dismiss plaintiffs' complaint and for a declaration of the constitutionality of the statutes. The City's affidavit demonstrated factually that there was no current basis for complaint about rent control operations

(R. 219-230). The attorney-general, for the State defendant, also cross-moved for dismissal of the action as to the State (R. 231).

B. The Decision at Special Term

The motions were heard on July 19, 1978 by Justice Franklin W. Morton, Jr., at Special Term, Kings County. He decided them in an opinion published only in the New York Law Journal on October 4, 1978, p. 13, c.2-4 (R. 13-20), and an order was entered on October 18, 1978 (R. 9-12). The court's order denied plaintiffs' motions for summary judgment to declare the challenged rent laws unconstitutional. The order also denied the cross-motions for dismissal made by the New York City and New York State defendants and the city's prayer for affirmative declaratory judgment of the constitutionality of the challenged law. Instead, the Court ordered that the action be placed on the appropriate trial calendar and proceed expeditiously to trial.

C. The Decision of the Appellate Division

Both plaintiffs and defendants disagreed with the Special Term decision and both appealed from the order and judgment to the Appellate Division, Second Department.

Upon questioning by the Presiding Justice of the Appellate Division, Second Department, at oral argument before that court, the appellants' attorney asserted that he did not believe there were any triable issues of fact and that he believed that the allegations of his complaint were sufficient to grant judgment on the pleadings. Our attorneys agreed that there were no triable issues of fact but contended that there should be judgment for defendants because plaintiffs failed to overcome the presumption of constitutionality of the statutes attacked.

The Appellate Division unanimously (72 A.D.2d 758, 421 N.Y.S.2d 826) dismissed the complaint for the reason

that ". . . plaintiffs have failed to submit sufficient evidence to rebut the presumption that the laws in question are constitutional . . . All parties to this matter request that a declaration as to constitutionality be made upon the instant record. In our opinion, plaintiffs have failed to set forth sufficient facts to rebut the presumption of constitutionality."

D. The Decision at the Court of Appeals

Only the appellants appealed to the Court of Appeals (R. 259) (Jur. Statement, p. 11, incorrectly says both parties appealed). In place of the Appellate Division finding simply dismissing the complaint, the Court of Appeals upheld the constitutionality of the rent control law. And although the record showed abundantly that the rent control law was for at least several years administered without substantial criticism, it rejected the "unconstitutional as administered" claim on a legal ground because of appellants' inability to cite any legal authority in support of their argument, and its belief that such objections to administration are political questions properly addressed to the legislative or executive branches of government.

ARGUMENT

The New York Court of Appeals correctly held that the New York statutes and regulations which regulate residential rents are constitutional.

A. The cases upholding rent statutes against specific challenges

Although this case is a challenge to the constitutionality of the New York City Rent Control Law, the State Enabling Act, the City Rent Stabilization Law, the Emergency Tenants Protection Act and other statutes or sections thereof as listed in the complaint, it fails to

clearly state any cognizable legal theory or to allege and prove any complaint of deprivation of a recognized, constitutionally protected right.

The constitutionality of rent controls has been sustained against a wide variety of attacks over a long number of years:

Block v. *Hirsh,* 256 U.S. 135 (1921);
Marcus Brown Co. v. *Feldman,* 256 U.S. 170 (1921);
People ex rel. Durham R. Corp. v. *La Fetra,* 230 N.Y. 429 (1921), app. dism. 257 U.S. 665 (1921);
Bowles v. *Willingham,* 321 U.S. 503 (1944);
Twentieth Century Associates v. *Waldman,* 294 N.Y. 571 (1945), app. dism. 326 U.S. 697, 90 L. Ed. 410 (1946);
Woods v. *Miller Co.,* 333 U.S. 138 (1948);
Lincoln Bldg. v. *Barr,* 1 N.Y. 2d 413, 153 N.Y.S. 2d 633 (1956), app. dism. 355 U.S. 12 (1957);
Four Maple Drive Realty Corp. v. *Abrams,* 2 A.D. 2d 753, 153 N.Y.S. 2d 747 (1956), affd. 2 N.Y. 2d 837, 159 N.Y.S. 2d 976 (1957), app. dism. 355 U.S. 14 (1957);
I.L.F.Y. Co. v. *Temporary State Housing Rent Commission,* 10 N.Y. 2d 263, 219 N.Y.S. 2d 249 (1961), app. dism. 369 U.S. 795 (1962);
8200 Realty Corp. v. *Lindsay,* 27 N.Y. 2d 124, 313 N.Y.S. 2d 733, app. dism. 400 U.S. 962 (1970);
Davenport v. *Berman,* 420 F. 2d 294;
Israel v. *City Rent and Rehabilitation Administration,* 285 F. Supp. 908, 910;
Amsterdam-Manhattan, Inc. v. *City Rent & R. Admin.,* 43 Misc. 2d 889, 252 N.Y.S. 2d 758, affd. 21 A.D. 2d 965, 252 N.Y.S. 2d 395, affd. 15 N.Y. 2d 1014, 260 N.Y.S. 2d 23.

The Second Circuit Court of Appeals has also twice upheld the constitutional validity of the procedure employed by the city rent agency.

Eisen v. *Eastman,* 421 F. 2d 560, 567;
Mkwanazi v. *Kenray Associates Inc.,* 410 F. 2d 1143, 1144.

The Rent Stabilization law was recently upheld against a constitutional challenge in *Kaplan* v. *Prince,* 444 U.S. 938, 62 L.Ed. 2d 304 (1979), which raised the following questions (48 U.S. Law Week 3166):

> "(1) Are rent control laws unconstitutional taking without just compenstaion to landowner in violation of Fifth and Fourteenth Amendments? (2) Does rent control law violate Article I, §10, and Fifth and Fourteenth Amendments because (a) law depends upon existence of emergency that did not exist at time of law's enactment and does not presently exist; (b) five percent or less vacancy rate standard for 'emergency' is undefined, illusory and self-perpetuating; (c) law applies indiscriminately to all residential dwellings without distinguishing classes of housing where rental and vacancy rates may be significantly higher; (d) law as applied to owner has required him to restore service that, under owner's leases with tenants, is optional and would have had no effect on rental rate? (3) Is due process denied when (a) administrative hearing officer does not prepare detailed report in violation of administrative tribunal's own rules; (b) administrative tribunal does not hear testimony or listen to available tape recording, no transcript of testimony is made, no hearing officer's report is prepared and agency is not otherwise adequately informed of proceeding? (4) Does due process require party to administrative hearing to be furnished with draft opinion that, if adopted by tribunal, will become decision of agency? (5) Does administrative agency delay of two years and three months between hearing and decision constitute denial of due process?"

This Court dismissed the appeal from the decision of the New York Appellate Division, First Department, "for want of a substantial federal question."

B. The police power as the basis for rent controls

To pass constitutional muster, a legislative measure enacted pursuant to the governmental police power must be directed to the effectuation of a constitutionally permissible objective and must employ means rationally related to achieving that governmental purpose. *Ferguson* v. *Skrupa,* 372 U.S. 726, 733 (1963), *Nebbia* v. *New York,* 291 U.S. 502, 537 (1934), *Gold* v. *DiCarlo,* 235 F. Supp. 817, 820 (S.D. N.Y., 1964),*aff'd.* 380 U.S. 520 (1965).

The use of both price and rent controls to accomplish legitimate legislative purposes have long been judicially approved modes of exercise of the police power. *Yakus* v. *U.S.,* 321 U.S. 414 (1944), *Sunshine Coal Co.* v. *Adkins,* 310 U.S. 381 (1940), *Nebbia* v. *New York,* 291 U.S. 502 (1934), *Block* v. *Hirsch,* 265 U.S. 135 (1921), *Gold* v. *DiCarlo,* 235 F. Supp. 817 (S.D., N.Y., 1964), *aff'd* 380 U.S. 520 (1965), *Helmsley* v. *Borough of Ft. Lee,* 78 N.J. 200, 394 A. 2d 65 (1978), app. dism. 440 U.S. 978 (1979).

C. Legislation does not become unconstitutional solely because it exists for more than a few years

Where the continued validity of a regulatory statute depends on the continued existence of a recited emergency, the reviewing court is guided by the dual presumption that the legislature had before it facts which support the enactment and that the legislation passed is a constitutional exercise of the police power. *U. S.* v. *Carolene Products,* 304 U.S. 144, 152 (1938), *South Carolina State Hwy. Dept.* v. *Barnwell Bros.,* 303 U.S. 177, 191 (1938), *Lincoln Bldg. Associates* v. *Barr,* 1 N.Y. 2d 413, 153 N.Y.S. 2d 633 (1956), app. dism. 355 U.S. 12 (1957), *East New York Sav. Bank* v. *Hahn,* 293 N.Y. 622, 627, *aff'd* 326 U.S. 230 (1945).

The courts should not substitute their own judgment for that of the legislature so long as there is any conceivable "state of facts either known or which could reasonably be assumed" to support the legislative enactment. *U.S.* v. *Carolene Products Co.*, 304 U.S. 144, 154; *East New York Sav. Bank* v, *Hahn*, 326 U.S. 230, 234; *Lincoln Bldg. Associates* v. *Barr*, 1 N.Y. 2d 413, 153 N.Y.S. 2d 633, 635, app. dism. 355 U.S. 12 (1957).

The New York State legislature made factual findings which supported controls when it enacted rent controls in 1950; when the State passed the Enabling Act in 1962 (L. 1962, ch. 21) (officially, the Local Emergency Housing Rent Control Act, McKinney's Uncon. Laws, Sec. 8601 *et seq.*) which transferred administration of New York City rent control to the city; and when the New York City Council enacted its own statute in 1962. In addition the state legislature renewed and amended the state law in 1951, 1953, 1955, 1957, 1959 and 1961. The City renewed the rent control law in 1964, 1967, 1970, 1973, 1976, and the last such findings were legislated on March 27, 1979. In every case the city renewal of rent control was based on a current housing census by the U.S. Census Bureau, an elaborate analysis of the census data by outside experts, and public hearings for landlords, tenants and others interested.

D. Recent legislative findings

The most recent housing survey, done by the U.S. Census Bureau and published in January 1979, found a net rental vacancy rate of 2.95% in 1978, well below the 5% figure which would automatically terminate rent control in New York City. P. Marcuse, *Rental Housing in the City of New York: Supply and Condition 1975-1978*, p. 6, p. 99, *et seq. See also*, New York Times, July 3 ,1979, p. B-1 and 4. This report was the basis for the city council's recent finding that a state of acute emergency continued in the rental housing market and its consequent

re-enactment of rent control for a new three year period. City Council Minutes, pp. 167 through 358, 475, 476, Res. No. 489.

E. The rent laws do not unconstitutionally "take" property

The rent control law authorized by the New York legislature provides virtually automatic general rent increases up to 7½% per year for all qualifying landlords. It requires the city rent agency to review the factors in its maximum base rents formula and make concomitant adjustments in rent ceilings on a biennial basis which has resulted in increases in the MBR rent ceilings of 8½% in 1974, 22% in 1976, 9% in 1978 and 10% in 1980 for a cumulative total of 58.7% since the 1972 increases, and a permissible possible total collectible increase of 91.7% at the rate of 7½% per year since 1972. The law also makes available additional rent increases for reasons of hardship, increased labor costs, increased fuel costs, additional equipment and facilities, major capital improvements, substantial rehabilitation, etc. *See,* Admin. Code, Sec. Y51-5.0; New York City Rent, Eviction and Rehabilitation Regulations, Part III, Sections 33 through 33.10, and 33d(2).

Appellants' arguments (Jur. Statement, p. 22) that the rate of return on investment allowed by the rent laws is so low as to amount to a "taking" in contravention of the constitutional guarantee against deprivation of property without due process, is fallacious. That guarantee protects individuals from direct governmental appropriation. It does not insulate one from the effects of—even consequential injuries from—lawful regulation. *Bowles* v. *Willingham,* 321 U.S. 503; *Basin, Inc.* v. *Federal Energy Admin.,* 552 F. 2d 931, 938 (Temp. Em. Ct. Apps. 1977), *cert. den.* 434 U.S. 821; *Condor Operating Co.* v. *Sawhill,* 514 F. 2d 351, 361 (Temp. Em. Ct. Apps. 1975), *cert. den.* 421 U.S. 976. The 8½ percent rate of return provided for in the rent control law clearly is not a "taking."

F. Urban housing decay is not caused by rent controls

In their attempt to causally link every conceivable real estate woe to the existence of rent regulations, appellants have made the emotionally charged allegation that abandonment and decrepitude of housing in New York City, particularly in the South Bronx, may also be laid at the doorstep of rent controls. However, a recent study in that area found that rent controls were *not* implicated as a cause, that they were in fact irrelevant to the abandonment problem. "Newsweek," October 10, 1977, "The Cities: Empty Houses," p. 100, citing a survey by the Women's City Club of New York.

George Sternlieb's "The Urban Housing Dilemma: The Dynamics of New York City's Rent Controlled Housing" (1972), cited by plaintiffs as supporting their contentions, (R. 64) actually reported (at pp. 350, 449, and 614) that landlords in areas with dilapidated housing did *not* point to rent controls as a significant factor in the rate of abandonment of housing, foreclosures or even as determinative of rent ceilings.

In the same vein, it has been shown that the rate of new construction in cities with rent controls is not significantly related to them. "Nation", May 26, 1979, "A Tenant Revolt," p. 597. A study conducted by John Gilderbloom for the California Department of Housing and Community Development, compared rates of new construction in 26 rent-controlled New Jersey cities with those in 37 non-controlled cities and found virtually "no net effect." "Nation", May 26, 1979, at 599. In New York there can hardly be expected to be any rent control-based decline in new construction since new construction is not subject to regulation.

The direct causes of abandonment noted in both the above reports were redlining, vandalism, and the failure of tenants to pay rents. This kind of "decay occurs in non-

controlled cities as well. A National Urban League study of abandonment found that New York ranked fifth behind four non-rent controlled cities (St. Louis, Cleveland, Chicago and Hoboken, N.J.)." "Nation," May 26, 1979, at 600.

G. The forum for resolution of differing political contentions is the legislature not the courts

The only discernible consistent statement made by plaintiffs has been their clear disagreement with and disapproval of the existence of rent controls, *i.e.*, an argument directed to the policies behind the adoption of the New York rent laws. Such arguments do not constitute a cause of action or a basis for judicial relief. The remedy available to plaintiffs based on their claims herein, if any, reposes with the legislature, and plaintiffs should seek their relief in the legislature. Plaintiffs' response is to complain that they cannot win in that forum because there are more tenants than landlords.

The California Supreme Court dealt with the same sort of argument in *Birkenfeld* v. *City of Berkley,* 130 Cal. Rptr. 465, 550 P. 2d 1001, 1013 (1976):

> "[I]t is argued that initiative enactment of local rent control measures violates landlords' due process rights because tenants are in the majority and will always vote in favor of rent control as a result of their direct economic interest in the outcome. The fact that the initiative process results in legislation reflecting the will of the majority and imposing certain burdens upon landlords can hardly be deemed a ground for holding the legislation invalid. It is of the essence of the police power to impose reasonable regulations upon private property rights to serve the larger public good. (*Queenside Hills Realty Co.* v. *Saxl* (1946), 328 U.S. 80, 82-83, 66 S.Ct. 850, 90 L. Ed. 1096; *Clemons* v. *City of Los Angeles* (1950), 36 222 P. 2d 439)."

Critical opinions of and disagreements with choices made by a legislative body should appropriately be directed to the legislative body. The law is well settled that the courts do not determine the weight and significance of economic and statistical reports and opinions, as appellants ask here, and that their weight and significance is evaluated by the legislative body in determining what laws to enact. In *East N. Y. Savings Bank* v. *Hahn,* 326 U. S. 230 (1945), it was stated:

> "We are invited to assess not only the range and incidence of what are claimed to be determining economic conditions insofar as they affect the mortgage market—bank deposits and war savings bonds; increased payrolls and store sales; available mortgage and rise in real estate values—but also to resolve controversy as to the causes and continuity of such improvements • • • Merely to enumerate the elements that have to be considered shows that the place for determining their weight and their significance is the legislature not the judiciary."

In summary, the essence of plaintiffs' attack on the constitutionality of state and local rent legislation is their contention that the legislatures that have repeatedly reenacted those laws have exercised bad judgment. Declarations of unconstitutionality cannot rest upon simple disagreement with the legislature.

H. The early difficulties of administration caused by the "MBR" law have long been resolved and standard rent control is now administered in a fair and efficient manner.

Anticipating that their direct attack on the legislation could fail, the plaintiffs resorted to an "unconstitutional-as-administered" theory which contends, in essence, that orders permitting statutory rent increases have been so

long delayed as to amount to a de-facto unconstitutional taking of property.

However, the complaint does not state any facts which could provide the basis of such a theory because the complaint only contains allegations which even if true, all refer to circumstances occurring more than five and six years ago.

Thus summary judgment against plaintiffs was proper because no triable issues of fact were ever raised by the pleadings (R. 53). To sustain their theory plaintiffs would be required to establish, that the laws are now so poorly administered as to amount to deprivation of plaintiffs' property. They have not pleaded so, and they made no showing of evidence in their summary judgment papers sufficient to define any issue of fact material or substantial enough to warrant a trial.

The reason that the complaint did not contain any facts to support plaintiffs' theory is evident from the factual affidavit submitted by the City to Special Term (R. 221 et seq.). It contained very striking statistical data which established that the city rent agency is remarkably efficient in its processing of applications, and particularly in the issuance of rent increase orders (R. 226).

The appellants argue about events resulting from early MBR processing. The defects in processing that occurred five and six years ago were cured first by the interim remedies granted landlords in the courts and finally in late 1974 and thereafter by a new system which expeditiously allowed for MBR rent increases. The cases cited to support plaintiffs' argument are irrelevant because they all refer to the early implementation period of the MBR law which ended in 1974 (R. 223, 226).

Plaintiffs' reliance on *Housing Development Administration, N.Y.C.* v. *Community Housing Improvement Program,* 398 N.Y.S. 2d 997 (App. Div., 2nd Dept., 1977), *aff'g*

90 Misc. 2d 813, 396 N.Y.S. 2d 125 (App. Term, 2nd & 11th Jud. Dists., 1977), *modifying* 83 Misc. 2d 977, 374 N.Y.S. 2d 520 (Civil Court, N.Y.C., 1975), is unwarranted. That case began as an action brought by the Housing Development Administration in Civil Court to enjoin certain landlords from cutting off heat and hot water to their tenants' apartments. The landlord-defendants responded by filing a one sentence counterclaim alleging that all the rent laws were unconstitutional, which was promptly seized upon by the Civil Court judge who held a trial on that claim despite the fact that he clearly lacked subject matter jurisdiction over it. The decision made by the Civil Court (Klieger, J.) on the counterclaim, based on wrongfully usurped jurisdiction, as well as the findings made by the Court at that time, are null and void. To the extent that those findings are considered at all, it must be noted that they are reflective of conditions prior to and during the implementation stages of the MBR system, a period long gone. The slight support originally given to the *Kleiger* case by the Appellate Division was withdrawn when this case was argued and it was decided that there was insufficient evidence to invalidate the rent control laws.

Applications for MBR rent increase are *now* self-executing and are collectible immediately upon service of notice on the tenants by the landlord. Protests are almost all current.

Conclusion

Appellants failed to state a cause of action upon which relief can be predicated. Appellants did not establish that they were personally injured in specific transactions with the rent office and have no standing, therefore, to challenge the constitutionality of the rent laws. They have pleaded no facts of deprivation of protected constitutional rights either through the operation of the rent laws or their administration by city agencies. Any cause of action which

appellants might have had, has been mooted by the progressive events of the last five years. Their true underlying complaint, that they simply don't like operating in a rental housing market affected by governmental regulation, is non-justiciable and therefore beyond the jurisdiction of the Court. *Queenside Hills Realty Co.* v. *Saxl,* 328 U.S. 80, 82 (1946), *U.S.* v. *Carolene Products Co.,* 304 U.S. 144, 154 (1938); *Block* v. *Hirsch,* 256 U.S. 135, 158 (1921).

The appeal should be dismissed for want of a substantial federal question, or in the alternative the order of the Court of Appeals entered June 26, 1980 should be affirmed.

Dated: New York, New York
Dec. 19, 1980

Respectfully submitted,

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Rent Control Division, HPD
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Supreme Court, U.S.
FILED
NOV 24 1980
MICHAEL RODAK, JR., CLERK

No. 80-669

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

BENSON REALTY CORP., CHAI ASSOCIATES, INC., HINCKLEY REALTY CORP. 615 EAST 168TH ST. CORP., ROBERT BEREZIN, SHIRLEY BEREZIN, MORRIS FADER, ANITA FADER, COMMUNITY HOUSING IMPROVEMENT PROGRAM, INC., BRONX REALTY ADVISORY BOARD, INC., ASSOCIATED BUILDERS & OWNERS OF GREATER NEW YORK, INC., AND 383 EAST 17TH ST. INC., individually and on behalf of all others similarly situated,

Appellants,

against

EDWARD KOCH, AS MAYOR OF THE CITY OF NEW YORK, ANTHONY GLIEDMAN, AS ADMINISTRATOR OF THE HOUSING AND DEVELOPMENT ADMINISTRATION OF NEW YORK CITY, DANIEL W. JOY AS COMMISSIONER OF THE DEPARTMENT OF RENT AND HOUSING MAINTENANCE OF NEW YORK CITY, JOSEPH B. GOLDMAN, AS COMMISSIONER OF THE NEW YORK STATE DIVISION OF HOUSING & COMMUNITY RENEWAL AND CITY RENT AGENCY,

Appellees.

ON APPEAL FROM THE COURT OF APPEALS
OF THE STATE OF NEW YORK

MOTION TO DISMISS OR AFFIRM

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of Counsel

Questions Presented

1. As to the State enabling acts (L. 1962, ch. 21 and L.1974, ch. 576) providing for rent regulation, which are and have been predicated upon a frequent periodic re-examination by the New York Legislature of the problem of whether an emergency exists or continues to exist with reference to the supply of housing accommodations: Whether the New York Court of Appeals properly held that the appellants, by their mere affidavits, which concentrated on the effect of control on property owners had not effectively rebutted the presumption that there was a factual basis for the Legislature's determination as to the continued existence of an emergency. No substantial federal question is presented.

2. Whether the New York Court of Appeals correctly held that the appellants' papers contained only generalized conclusions which did not establish an unconstitutional "taking" of the property of any individual property owner by the New York City Rent Control Law. No substantial federal question is presented.

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No. 80-669

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

BENSON REALTY CORP., CHAI ASSOCIATES, INC., HINCKLEY REALTY CORP. 615 EAST 168TH ST. CORP., ROBERT BEREZIN, SHIRLEY BEREZIN, MORRIS FADER, ANITA FADER, COMMUNITY HOUSING IMPROVEMENT PROGRAM, INC., BRONX REALTY ADVISORY BOARD, INC., ASSOCIATED BUILDERS & OWNERS OF GREATER NEW YORK, INC., AND 383 EAST 17TH ST. INC., individually and on behalf of all others similarly situated,

Appellants,

against

EDWARD KOCH, AS MAYOR OF THE CITY OF NEW YORK, ANTHONY GLIEDMAN, AS ADMINISTRATOR OF THE HOUSING AND DEVELOPMENT ADMINISTRATION OF NEW YORK CITY, DANIEL W. JOY AS COMMISSIONER OF THE DEPARTMENT OF RENT AND HOUSING MAINTENANCE OF NEW YORK CITY, JOSEPH B. GOLDMAN, AS COMMISSIONER OF THE NEW YORK STATE DIVISION OF HOUSING & COMMUNITY RENEWAL AND CITY RENT AGENCY,

Appellees.

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

MOTION TO DISMISS OR AFFIRM

Preliminary Statement

The Attorney General of the State of New York, appearing herein as counsel for the State Commissioner of Hous-

ing and Community Renewal, appellee, and in his statutory capacity pursuant to New York Executive Law, § 71, moves to dismiss the appeal taken to this Court from the final order and judgment of the Court of Appeals of the State of New York entered in this action on June 26, 1980.

Opinions Below

The New York Court of Appeals opinion is reported at 50 N Y 2d 994, *sub nom. Benson Realty Corp.* v. *Beame.* The Appellate Division opinion is reported at 72 A D 2d 758, 41 N.Y.S. 2d 826. The decision at Special Term, Kings County is unreported, but is reproduced in the appellants' appendix (App. C., pp. 7a-13a).

Jurisdiction

Appellants claim that this Court may take jurisdiction pursuant to 28 U.S. Code, §§ 1357(2) and 2101(c). Although the appellants designate the judgment and order appealed from as final, it must be observed, at the outset, that the Court of Appeals declaration of constitutionality, contained in the order and judgment, stemmed from the Court's finding "that plaintiffs have not rebutted the presumption of constitutionality" predicated upon the Legislature's explicit finding with reference to the inadequate supply of residential housing accommodations (50 N Y 2d 994). Any element of finality in the order and judgment, therefore, appears to have stemmed from a failure of proof, a factual matter which does not merit review by this Court.

The following are the constitutional and statutory provisions which the appellants claim to be involved (Jur. Statement, p. 3).

Constitutional Provisions Involved

The Fifth Amendment to the Constitution provides in pertinent part as follows:

> No person shall . . . be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use, without just compensation.

The Fourteenth Amendment to the Constitution provides, in pertinent part, as follows:

> . . . No state shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of laws.

Statutes Involved

Laws of the State of New York for 1962, Chapter 21, as amended (the Local Emergency Housing Rent Control Act);

Laws of the State of New York for 1974, Chapter 576, as amended (the Emergency Tenant Protection Act);

The New York City Administrative Code, Chapter 51, Title Y, §§ Y51-1.0-18.0, as amended (New York City Rent and Rehabilitation Law);

The New York City Administrative Code, Chapter 51, Title YY, §§ YY51-1.0-7.0, as amended (New York City Rent Stabilization Law);

The foregoing are set forth in part in Appellants' Appendix D. They should be supplemented, at least, by Laws of New York, 1977, Chapter 203 and Laws of New York, 1971, Chapters 371, 372, 373, 374, 375 and 1012 contained in appendices to this motion (App. E and F, *infra*).

POINT I

The New York Court of Appeals properly held that the plaintiffs, by their mere affidavits, which concentrated on the effects of controls of property owners, had not effectively rebutted the presumption that there was a factual basis for the Legislature's determination that an emergency continued to exist as to the supply of housing accommodations. No substantial federal question is presented.

(1)

Prior attempts to attack the constitutionality of New York's rent regulatory legislation were rejected by this Court in *I.L.F.Y. Co.* v. *Temporary State Housing Rent Commission,* 10 N Y 2d 263 (1961), app. dsmd. 369 U.S. 795 (1962) and in *Lincoln Bldg. Associates* v. *Barr,* 1 N Y 2d 413 (1956), app.dsmd. 355 U.S. 12 (1957). The Court dismissed the appeals there taken for want of a substantial federal question. The appellants' jurisdictional statement in this case fails to present such a question, particularly in the light of the unsatisfactory record upon which it is predicated.

The jurisdictional statement has apparently been prepared to avoid significant aspects of New York legislative and judicial history. It stresses an assertion that rent control "has been in effect for the past 37 years" (p. 4), and creates the erroneous impression that there have been no legislative "emergency" findings for 37 years (p. 15), but ignores the fact, judicially noted by the Court of Appeals, that the need for rent control in New York had been "re-examined legislatively at intervals of three years". Indeed the Court of Appeals observed in a portion of its opinion avoided by the appellants, that "the most recent such review" by the New York State Temporary Commission on Rental Housing (which included four landlord representatives) had, in a report submitted

March 27, 1980, concluded that (Jur. Statement, pp. 1a-2a):

> "There is need for continuing a form of rent regulation in those jurisdictions in which housing accommodations are presently subject to rent control or rent stabilization."*

Rent regulatory statutes have been carefully scrutinized and implemented by the New York Court of Appeals. The State's policy to *decontrol* residential accommodations *gradually* was sustained in *City of New York* v *State of New York,* 31 N Y 2d 804 (1972), where the so-called Vacancy Decontrol Law (L. 1971, ch. 371 § 6), which exempted housing accommodations that became vacant from regulation and control, was sustained as constitutional

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* The Temporary Commission submitted to the Legislature a two-volume report on housing accommodation problems. The first volume (455 pages in length, supplemented by 191 pages of appendices consisted of the "COMMISSION STUDY AND RECOMMENDATIONS CONCERNING THE RENT REGULATORY SYSTEMS." The second volume (155 pages long, supplemented by five separate extended appendices) encompassed the "COMMISSION STUDY AND RECOMMENDATIONS ON CONVERSION OF RESIDENTIAL PROPERTY TO COOPERATIVE OR CONDOMINIUM STATUS". We do not deem it essential to burden the Court with these extensive reports, but will supply copies, if desired by the Court.

The members of the commission voted on at least 140 separate motions dealing with 114 recommendations made in the first volume of the report. The report was subscribed by the two public members of the eleven man Commission (one of the public representative memberships having remained vacant) with separate dissents by four tenant representatives and four landlord representatives each.

The first motion voted upon by the Commission (Report, Vol. I, Appendix B, p. 6) indicates that, as a preface to all the further deliberations of the Commission, its members (*all public, landlord and tenant representatives*) on January 16, 1979 "unanimously agreed" to the recommendation set forth in the Court of Appeals opinion as to the "need for continuing a form of rent regulation in those jurisdictions in which housing accommodations are presently subject to rent control or rent stabilization."

despite the City's argument that such decontrol invaded the *City's home rule powers.*

Further, in *241 E. 22nd Street* v. *City Rent Agency* and in *Kerr* v. *Urstadt,* both 33 N Y 2d 134 (1973), the State was sustained in its enactment of a statute (L. 1971, ch. 1012) which reposed in the State Commissioner of Housing a power to veto any proposed local rent *regulation* which was more stringent or restrictive than the provisions previously in force. Chapter 1012 was but a part of a package of bills passed during the 1971 legislative session dealing with the objective of facititating the transition from regulation to a normal market by removing the threat of stricter controls (33 N Y 2d 134, at pp. 142-144).

Chapter 372 of the Laws of 1971, which became a law on June 1, 1971, prohibited the enactment of *local laws* subjecting housing accommodations to more stringent or restrictive provisions of regulation and control "than those presently in effect." In *201 East 68th Street Corp.* v. *City Rent Agency,* 34 N Y 2d 560 (1974), the validity of chapter 372 was upheld and local rent control laws (Local Law No. 24 of Local Laws of the City of New York §§ 2 and 3) were invalidated as violative of the *state law.* The Court of Appeals noted that the arguments presented by the City and tenants' representatives should be addressed elsewhere for "the appropriate prompt remedy, if one be indicated, is legislative" (34 N Y 2d 560, at p. 562).

Furthermore, in *Mayer* v. *City Rent Agency,* 46 N Y 2d 139 (1978), it was held that the State Commissioner of Housing could not *validate* a so-called Labor Cost pass-along *Repeal* Law (N.Y. City Local Law No. 76 of 1977) because its repeal provisions violated the statutory prohibition against the enactment of local laws subjecting rent controlled housing accommodation to more stringent or restrictive regulation and control than that in effect on June 1, 1971. The authority of approval of the Commissioner was held to be *limited* to local "rules and regu-

lations" and not to extend to local laws or ordinances (46 N Y 2d 139, at p. 152).

The New York Legislature has before it the report of its Temporary Commission on Rental Housing. No longer ago than January 16, 1979 it was agreed by all members of the Commission that there was a "continuing need" in New York for some form of rent *regulation*. Before July 1, 1981, the New York Legislature must decide what form, if any, such regulation should take. Particularly since the record, which will in 1981 be legislatively developed, on the basis of the Commission's recommendations (including the dissenting reports) and on the basis of Committee hearings, will be more *complete* and *current* than the materials contained in the present record, there is no present justification for this resort to judicial review.

The appellants have failed to present a substantial federal question to this Court for review, nor, upon this record, have they presented any reason for pressing this Court to eke out such a question. *Helmsley* v. *Borough of Fort Lee,* 78 N.J. 200, 394 A. 2d 65 (1978), app. dsmd., 440 U.S. 978 (April 2, 1979) "for want of a substantial federal question."

POINT II

The Court of Appeals correctly held that the plaintiffs' papers contained only generalized conclusions which did not establish an unconstitutional "taking" of the property of any individual property owner by the New York City Rent Control Law. No substantial federal question is presented.

The appellants seek to resurrect (pp. 19-25) discarded doctrine that would elevate "regulation" to the status of property "taking". The New York statutes complained of *do not* authorize the "taking" of any property interests. They recognize the rights of landlords to collect rents.

That property interest is neither disregarded nor confiscated. But regulation thereof has been provided for under a series of statutes which have been carefully drafted to insure to landlords a proper return on their investment. When "regulation" has been extended, such extension has followed only upon a legislative finding that such extension was necessary. The instant record does not show that the New York state statutes have had a confiscatory impact. Similar arguments recently presented to this Court in *Helmsley* v. *Borough of Fort Lee* (*supra*. 78 N.J. 200, 394 A. 2d 65, app. dsmd., 440 U.S. 978), were properly rejected by this Court, which found that they did not present a substantial federal question.* See also *Agins* v. *City of Tiburon,* No. 79-602, —— U.S. ——, 65 L.Ed. 2d 106, 100 S. Ct. —— (decided June 10, 1980).

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* In that respect, this Court merely followed the well-established doctrine, never rejected since *Nebbia* v. *New York*, 291 U.S. 502 (1934) and *Olsen* v. *Nebraska,* 313 U.S. 236 (1941), that regulation is not tantamount to a condemnatory taking.

We are amazed that appellants (pp. 20, 23, 24) place so much reliance, in the face of this Court's precedents, upon the *dicta* contained in the pronouncements of an inferior New York court, which was held to have made those pronouncements in the absence even of *jurisdiction* to do so. We refer to the appellants' repeated references to the extraordinary decision in *Housing and Development Administration* v. *Community Housing Improvement Program, Inc.*, 83 Misc 2d 977, 377 N.Y. Supp. 2d 520 (Civ. Ct. N.Y. 1975), rev'd 90 Misc 2d 813, 396 N.Y. Supp. 2d 125 (App. Term), aff'd 59 A D 2d 773, 398 N.Y.S. 2d 520 (App. Div., 1977).

CONCLUSION

The appeal should be dismissed for want of a substantial federal question. If the appeal is not dismissed in all respects, the order of the Court of Appeals, entered June 26, 1980, from which this appeal is taken, should be affirmed.

Dated: New York, New York
November 17, 1980

ROBERT ABRAMS
Attorney General of the
State of New York
Attorney for Appellee, Goldman, Commissioner of the New York State Division of Housing and Community Renewal and Pro Se, pursuant to New York Executive Law, § 71

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Assistant Solicitor General and
member of the bar of the Supreme
Court of the United States

Appendix E.

LAWS OF NEW YORK, 1977

CHAPTER 203

AN ACT to amend chapter five hundred seventy-six of the laws of nineteen hundred seventy-four and chapter three hundred twenty-nine of the laws of nineteen hundred sixty-three, relating to the control of and stabilization of and recontrol of rent in certain cases and the emergency housing rent control law, in relation to the effective date of such chapters and law and creating a temporary state commission on rental housing to make a comprehensive study of the condition and economics of rental housing throughout the state and all laws relating thereto, and to make recommendations thereon, and making an appropriation for the expenses of such commission Became a law June 1, 1977, with the approval of the Governor. Passed by a majority vote, three-fifths being present.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. Section seventeen of chapter five hundred seventy-six of the laws of nineteen hundred seventy-four, relating to the control of and stabilization of rent in certain cases, as amended by chapter four hundred eighty-six of the laws of nineteen hundred seventy-six, is hereby amended to read as follows:

§ 17. Effective date. This act shall take effect immediately and shall remain in full force and effect until the first day of July, nineteen hundred [seventy-seven] *eighty-one;* except that sections two and three shall take effect

EXPLANATION—Matter in *italics* is new; matter in brackets [ ] is old law to be omitted.

with respect to any city having a population of one million or more and section one shall take effect with respect to any other city, or any town or village whenever the local legislative body of a city, town or village determines the existence of a public emergency pursuant to section three of the emergency tenant protection act of nineteen seventy-four, as enacted by section four of this act, and provided that the housing accommodations subject on the effective date of this act to stabilization pursuant to the New York city rent stabilization law of nineteen hundred sixty-nine shall remain subject to such law upon the expiration of this act.

§ 2. Section two of chapter three hundred twenty-nine of the laws of nineteen hundred sixty-three, relating to the recontrol of rents in certain cases, as amended by chapter three hundred twenty of the laws of nineteen hundred seventy-five, is hereby amended to read as follows:

§ 2. This act shall take effect immediately and the provisions of subdivision six of section twelve of the emergency housing rent control law, as added by this act, shall terminate on June thirtieth, nineteen hundred [seventy-seven] *eighty-one.*

§ 3. Subdivision two of section one of chapter two hundred seventy-four of the laws of nineteen hundred forty-six, constituting the emergency housing rent control law, as amended by chapter three hundred nineteen of the laws of nineten hundred seventy-five, is hereby amended to read as follows:

2. The provisions of this act, and all regulations, orders and requirements thereunder shall terminate on June thirtieth, nineteen hundred [seventy-seven] *eighty-one.*

EXPLANATION—Matter in *italics* is new; matter in brackets [ ] is old law to be omitted.

§ 4. (a) A temporary state commission to be known as the temporary state commission on rental housing is hereby created to consist of eleven members to be appointed as follows: three by the governor, one of whom shall be chairman; three by the temporary president of the senate; one by the minority leader of the senate; three by the speaker of the assembly and one by the minority leader of the assembly. No person shall be a member of the commission while such person is a member of the senate or assembly. The commission shall choose from its members a vice chairman. Vacancies in the membership of the commission occurring from any cause shall be filled by the official authorized to make the original appointment in which the vacancy occurs.

(b) The duties of the commission hereby created shall be to make a study of and investigate the supplies, condition, and economics of and demand for rental housing throughout the state, their relationship to and effects upon state and local economies, and the operations of and effects of all state and local rent control laws and regulations; and to make recommendations as to what changes, if any, are needed in such laws.

(c) The commission may employ and at pleasure remove an executive director, counsel, and such other officers and clerical, stenographic, or technical assistants as it may require and fix their compensation within the amount appropriated therefor. The commission may sit at any place within the state and hold either public or private hearings. It, and each member thereof, shall have the power to administer oaths, take testimony, subpoena and compel the attendance of witnesses and the production of all books, papers, records and documents deemed material or pertinent to any subject within the scope of its investi-

EXPLANATION—Matter in *italics* is new; matter in brackets [ ] is old law to be omitted.

gations and shall generally have, possess and exercise all of the powers of a legislative committee.

(d) The members of such commission shall receive no compensation for their services but shall be reimbursed for their expenses actually and necessarily incurred in the performance of their duties hereunder. Notwithstanding any inconsistent provisions of law, general, special or local, ordinance, city or county charter, no officer or employee of the state or of any civil division thereof, shall be deemed to have forfeited or shall forfeit his office or employment by reason of his acceptance of membership on such commission.

(e) The commission may request and shall receive from any department, division, board, bureau or other agency of the state and from any political subdivision or agency thereof, such assistance and data as will enable it to properly consummate its studies and investigations hereunder.

(f) The commission may report from time to time and shall make a final report of its proceedings and recommendations to the governor and to the legislature on or before November fifteenth, nineteen hundred seventy-eight.

(g) The sum of two hundred thousand dollars ($200,000), or so much thereof as may be necessary, is hereby appropriated to the commission hereby created and made immediately available for its expenses, including personal service, in carrying out the provisions of this act. The moneys herein appropriated to such commission shall be payable out of the state treasury on the audit and warrant of the comptroller on vouchers certified or approved by the chairman of the commission as prescribed by law.

§ 5. This act shall take effect immediately.

EXPLANATION—Matter in *italics* is new; matter in brackets [ ] is old law to be omitted.

Appendix F.

CHAPTER 371

AN ACT to amend the emergency housing rent control law, in relation to extending the state rent control program for two years and the computation of hardship increases thereunder and to amend such law and the local emergency housing rent control act in relation to providing for vacancy decontrol

Became a law June 1, 1971, with the approval of the Governor. Passed by a majority vote, three-fifth being present

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. Subdivision two of section one of chapter two hundred seventy-four of the laws of nineteen hundred forty-six, constituting the emergency housing rent control law, as last amended by chapter four hundred eighty of the laws of nineteen hundred sixty-nine is hereby amended to read as follows:

2. The provisions of this act, and all regulation, orders and requirements thereunder shall terminate on June thirteenth, nineteen hundred [seventy-one] *seventy-three.*

§ 2. The opening paragraph of paragraph (a) of subdivision four of section four of such chapter, such paragraph (a) having been last amended by chapter twenty-one of the laws of nineteen hundred sixty-two, is hereby amended to read as follows:

The commission may from time to time adopt, promulgate, amend or rescind such rules, regulations and orders

EXPLANATION—Matter in *italics* is new; matter in brackets [ ] is old law to be omitted.

as it may deem necessary or proper to effectuate the purposes of this act, including practices relating to recovery of possession; provided that such regulations can be put into effect without general uncertainty, dislocation and hardship inconsistent with the purposes of this act; and provided further that such regulations shall be designed to maintain a system of rent controls at levels which, in the judgment of the commission, are generally fair and equitable and which will provide for an orderly transition from and termination of emergency controls without undue dislocations, inflationary price rises or disruption. Provision shall be made pursuant to regulations prescribed by the commission, for individual adjustment of maximum rents where the rental income from a property yields a net annual return of less than [six] *seven and one-half* per centum of the valuation of the property. Such valuation shall be the current assessed valuation established by a city, town or village, which is in effect at the time of the filing of the application for an adjustment under the subparagraph properly adjusted by applying thereto the ratio which such assessed valuation bears to the full valuation as determined by the state board of equalization and assessment on the basis of assessment rolls of cities, towns and villages for the year nineteen hundred fifty-four and certified for such year by such board pursuant to section forty-nine-d of the tax law; provided, however, that where at the time of the filing of the application for an adjustment under this subparagraph such board has computations for such year indicating a different ratio for subclasses of residential property in a city, town or village, the commission shall give due consideration to such different ratio except ratios in excess of one hundred percent, provided, further, that where such board has not determined and certified any ratio pursuant to such section of such law for a city, town or village for such year, the commission shall apply the

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ratio determined or certified by such board pursuant to section twelve hundred twelve of the real property tax law for the most recent year; except where there has been a bona fide sale of the property within the period between March fifteenth, nineteen hundred fifty-seven, and the time of the filing of the application, as the result of a transaction at arms' length, on normal financing terms at a readily ascertainable price and unaffected by special circumstances such as a forced sale, exchange of property, package deal, wash sale or sale to cooperative; provided, however, that where there has been more than one such bona fide sale within a period of two years prior to the date of the filing of such application the commission shall disregard the most recent of such sales if a prior sale within such two-year period was adopted as the valuation of the property in a proceeding under this subparagraph. In determining whether a sale was on normal financing terms, the commission shall give due consideration to the following factors:

§ 3. Paragraph (i) of subdivision two of section two of such chapter, as last amended by chapter three hundred thirty-seven of the laws of nineteen hundred sixty-one, is hereby amended to read as follows:

(i) housing accommodations [in one or two family houses] which [are or] become vacant [on or after April first, nineteen hundred fifty-three,] provided, however, that this exemption shall [remain effective only so long as the housing accommodations are not occupied for other than single family occupancy] *not apply or become effective where the commission determines or finds that the housing accommodations became vacant because the landlord or any person acting on his behalf, with intent to cause the tenant to vacate, engaged in any course of conduct (including, but not limited to, interruption or dis-*

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continuance of essential services) which interfered with or disturbed or was intended to interfere with or disturb the comfort, repose, peace or quiet of the tenant in his use or occupancy of the housing accommodations: or

§ 4. Section ten of such chapter is hereby amended by adding thereto a new subdivision, to be subdivision five, to read as follows:

5. It shall be unlawful for any landlord or any person acting on his behalf, with intent to cause the tenant to vacate, to engage in any course of conduct (including, but not limited to, interruption or discontinuance of essential services) which interferes with or disturbs or is intended to interfere with or disturb the comfort, repose, peace or quiet of the tenant in his use or occupancy of the housing accommodations.

§ 5. Section eleven of such chapter is hereby amended by adding thereto a new subdivision, to be subdivision seven, to read as follows:

7. Any tenant who has vacated his housing accommodations because the landlord or any person acting on his behalf, with intent to cause the tenant to vacate, engaged in any course of conduct (including, but not limited to, interruption or discontinuance of essential services) which interfered with or disturbed or was intended to interfere with or disturb the comfort, repose, peace or quiet of the tenant in his use or occupancy of the housing accommodations may, within ninety days after vacating, apply to the commission for a determination that the housing accommodations were vacated as a result of such conduct, and may, within one year after such determination, institute a civil action against the landlord by reason of such conduct. In such action the landlord shall be liable to the

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tenant for three times the damages sustained on account of such conduct plus reasonable attorney's fees and costs as determined by the court. In addition to any other damages the cost of removal of property shall be a lawful measure of damages.

6. Subdivision five of section one of chapter twenty-one of the laws of nineteen hundred sixty-two, such chapter constituting the local emergency housing rent control act, is hereby amended to read as follows:

5. Authority for local rent control legislation. At any time after the effective date of this act, each city having a population of one million or more, acting through its local legislative body, is hereby authorized and empowered to adopt and amend local laws or ordinances in respect of the establishment or designation of a city housing rent agency. When it deems such action to be desirable or necessitated by local conditions in order to carry out the purposes of this section, such city, *except as hereinafter provided,* is hereby authorized and empowered to adopt and amend local laws or ordinances effective on or after May first, nineteen hundred sixty-two in respect of the regulation and control of residential rents, including but not limited to provision for the establishment and adjustment of maximum rents, the classification of housing accommodations, the regulation of evictions, and the enforcement of such local laws or ordinances. The validity of any such local laws or ordinances, and the rules or regulations promulgated in accordance therewith, shall not be affected by and need not be consistent with the provisions of the state emergency housing rent control law or with the rules and regulations of the temporary state housing rent commission thereunder.

Notwithstanding any local law or ordinance, housing accommodations which become vacant shall be exempt from

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regulations and control, provided, however, that this exemption shall not apply or become effective with respect to housing accommodations which, by local law or ordinance, are made directly subject to regulation and control by a city housing rent agency and such agency determines or finds that the housing accommodations become vacant because the landlord or any person acting on his behalf, with intent to cause the tenant to vacate, engaged in any course of conduct (including but not limited to, interruption or discontinuance of essential services) which interfered with or disturbed or was intended to interfere with or distrub the comfort, repose, peace or quiet of the tenant in his use or occupancy of the housing accommodations. The removal of any housing accommodation from regulation and control of rents pursuant to the vacancy exemption provided for in this paragraph shall not constitute or operate as a ground for the subjection to more stringent regulation and control of any housing accommodation in such property or in any other property owned by the same landlord, notwithstanding any prior agreement to the contrary by the landlord.*

§ 7. Subdivision nine of section one of such chapter is hereby amended by adding thereto a new paragraph, to be paragraph (d), to read as follows:

(d) It shall be unlawful for any landlord or any person acting on his behalf, with intent to cause the tenant to vacate, to engage in any course of conduct (including, but not limited to, interruption or discontinuance of essential services) which interferes with or disturbs or is intended to interfere with or disturb the comfort, repose, peace or quiet of the tenant in his use or occupancy of the housing accommodations.

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* So in original. [Word mispelled.]

EXPLANATION—Matter in *italics* is new; matter in brackets [ ] is old law to be omitted.

§ 8. Subdivision ten of section one of such chapter is hereby amended by adding thereto a new paragraph, to be paragraph (h), to read as follows:

(h) Any tenant who has vacated his housing accommodations because the landlord or any person acting on his behalf, with intent to cause the tenant to vacate, engaged in any course of conduct (including but not limited to, interruption or discontinuance of essential services) which interfered with or disturbed or was intended to interfere with or disturb the comfort, repose, peace or quite of the tenant in his use or occupancy of the housing accommodations may, within ninety days after vacating, apply for a determination that the housing accommodations were vacated as a result of such conduct, and may, within one year after such determination, institute a civil action against the landlord by reason of such conduct. Application for such determination may be made to the city housing rent agency with respect to housing accommodations which, by local law or ordinance, are made directly subject to regulation and control by such agency. For all other housing accommodations subject to regulation and control by local law or ordinance, application for such determination may be made to the state division of housing and community renewal. For the purpose of making and enforcing any determination of the state division, as herein provided, the provisions of sections seven, eight and ten, whenever they refer to the city housing rent agency, shall be deemed to refer to the state division. In such action the landlord shall be liable to the tenant for three times the damages sustained on account of such conduct plus reasonable attorney's fees and costs as determination by the court. In addition to any other damages the cost of removal of property shall be a lawful measure of damages.

§ 9. This act shall take effect immediately, except that sections four, five, seven and eight shall take effect on the

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tenth day after it shall have become a law and sections three and six shall take effect on June thirtieth, nineteen hundred seventy-one.

CHAPTER 372

AN ACT to amend the local emergency housing rent control act, in relation to limiting the authority of a city having a population of one million or more to subject additional housing to the regulation and control of residential rents and eviction

Became a law June 1, 1971, with the approval of the Governor. Passed by a majority vote, three-fifths being present

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. Subdivision five of section one of chapter twenty-one of the laws of nineteen hundred sixty-two, constituting the local emergency housing rent control act, is hereby amended to read as follows:

5. Authority for local rent control legislation. [At any time after the effective date of this act, each] *Each* city having a population of one million or more, acting through its local legislative body, [is hereby authorized and empowered to] *may* adopt and amend local laws or ordinances in respect of the establishment or designation of a city housing rent agency. When it deems such action to be desirable or necessitated by local conditions in order to carry out the purposes of this section, such city [is hereby authorized and empowered to], *except as hereinafter provided, acting through its local legislative body and not otherwise, may* adopt and amend local laws or ordinances

EXPLANATION—Matter in *italics* is new; matter in brackets [ ] is old law to be omitted.

[effective on or after May first, nineteen hundrd sixty-two] in respect of the regulation and control of residential rents, including but not limited to provision for the establishment and adjustment of maximum rents, the classification of housing accommodations, the regulation of evictions, and the enforcement of such local laws or ordinances. The validity of any such local laws or ordinances, and the rules or regulations promulgated in accordance therewith, shall not be affected by and need not be consistent with [the provisions of] state emergency housing rent control law or with [the] rules and regulations of the [temporary] state [housing rent commission thereunder] *division of housing and community renewal.*

Notwithstanding the foregoing, no local law or ordinance shall hereafter provide for the regulation and control of residential rents and eviction in respect of any housing accommodations which are (1) presently exempt from such regulation and control or (2) hereafter decontrolled either by operation of law or by a city housing rent agency, by order or otherwise. No housing accommodations presently subject to regulation and control pursuant to local laws or ordinances adopted or amended under authority of this subdivision shall hereafter be by local law or ordinance subjected to more stringent or restrictive provisions of regulation and control than those presently in effect.

§ 2. This act shall take effect immediately.

CHAPTER 373

AN ACT to amend the emergency housing rent control law and the local emergency housing rent control act, in relation to housing accommodations which are not the primary residence of the tenant in possession

EXPLANATION—Matter in *italics* is new; matter in brackets [ ] is old law to be omitted.

Became a law June 1, 1971, with the approval of the Governor. Passed by a majority vote, three-fifths being present

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. Subdivision two of section two of chapter two hundred seventy-four of the laws of nineteen hundred forty-six, constituting the emergency housing rent control law, is hereby amended by adding thereto a new paragraph, to be paragraph (1), to read as follows:

(1) housing accommodations which are not occupied by the tenant in possession as his primary residence provided, however, that any such housing accommodation shall continue to be subject to rent control as provided herein unless the commission issues an order decontrolling such accommodation which the commission shall do upon application by the landlord, whenever it is established by any facts and circumstances which, in the judgment of the commission, may have a bearing upon the question of residence, that the tenant maintains his primary residence at some place other than at such housing accommodation.

§ 2. Subdivision five of section one of chapter twenty-one of the laws of nineteen hundred sixty-two, constituting the local emergency housing rent control act, is hereby amended to read as follows:

5. Authority for local rent control legislation. At any time after the effective date of this act, each city having a population of one million or more, acting through its local legislative body, is hereby authorized and empowered to adopt and amend local laws or ordinances in respect of the establishment or designation of a city housing rent agency. When it deems such action to be desirable or necessitated by local conditions in order to carry out

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the purposes of this section, such city, *except as hereinafter provided,* is hereby authorized and empowered to adopt and amend local laws or ordinances effective on or after May first, nineteen hundred sixty-two in respect of the regulation and control of residential rents, including but not limited to provision for the establishment and adjustment of maximum rents, the classification of housing accommodations, the regulation of evictions, and the enforcement of such local laws or ordinances. The validity of any such local laws or ordinances, and the rules or regulations promulgated in accordance therewith, shall not be affected by and need not be consistent with the provisions of the state emergency housing rent control law or with the rules and regulations of the temporary state housing rent commission thereunder.

Notwithstanding the foregoing, no local law or ordinance shall subject to such regulation and control any housing accommodation which is not occupied by the tenant in possession as his primary residence; provided, however, that such housing accommodation not occupied by the tenant in possession as his primary residence shall continue to be subject to regulation and control as provided for herein unless the city housing rent agency issues an order decontrolling such accommodation, which the agency shall do upon application by the landlord whenever it is established by any facts and circumstances which, in the judgment of the agency, may have a bearing upon the question of residence, that the tenant maintains his primary residence at some place other than at such housing accommodation.

§ 3. This act shall take effect May first, nineteen hundred seventy-two.

EXPLANATION—Matter in *italics* is new; matter in brackets [ ] is old law to be omitted.

CHAPTER 374

AN ACT to amend the emergency housing rent control law, in relation to limitations on rent increases upon termination of rent controls in a municipality over classes of housing or all housing

Became a law June 1, 1971, with the approval of the Governor. Passed by a majority vote, three-fifths being present

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. Subdivision one of section twelve of chapter two hundred seventy-four of the laws of nineteen hundred forty-six, constituting the emergency housing rent control law, as last amended by chapter three hundred thirty-seven of the laws of nineteen hundred sixty-one, is hereby amended to read as follows:

1. Whenever the commission shall find that, in any municipality specified by the commission, (a) the percentage of vacancies in all or any particular class of housing accommodations is five per centum or more, or, (b) the availability of adequate rental housing accommodations and other relevant factors are such as to make rent control unnecessary for the purpose of eliminating speculative, unwarranted, and abnormal increases in rents and of preventing profiteering and speculative and other disruptive practices resulting from abnormal market conditions caused by congestion, the controls imposed upon rents by authority of this act in such municipality or with respect to any particular class of housing accommodations therein shall be [forthwith] abolished *in the manner hereinafter provided;* provided however that, except as otherwise provided in this section, no controls shall be abolished

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by the commission unless the commission shall hold a public hearing or hearings on such proposal at which interested persons are given a reasonable opportunity to be heard. Notice of such hearing shall be provided by publication in a daily newspaper published or having general circulation in the municipality affected not less than fifteen days prior to the date of the hearing.

§ 2. Subdivision two of section twelve of such chapter, as last amended by chapter three hundred thirty-seven of the laws of nineteen hundred sixty-one, is hereby amended to read as follows:

2. Notwithstanding the provisions of this section or any other provision of this act, the local governing body of a city or town, upon a finding that decontrol in such city or town is warranted after a public hearing upon notice by publication in a daily or weekly newspaper published or having general circulation in the city or town not less than twenty days prior to the date of hearing, and after notice to the commission, may adopt a resolution [requesting the commission] to decontrol all or any specified class of housing accommodation in such city or town. *Such resolution shall thereafter be filed with the division.* Upon receipt of any such resolution [the commission shall order] the controls imposed by authority of this act [to] *shall* be abolished in the city or town affected with respect to housing accomodations specified in such resolution *in the manner hereinafter specified.* [Such order of decontrol shall take effect on the first day of the fourth month following the month in which such resolution was received by the commission, and thereafter the provisions of this act shall not apply to any housing accommodations decontrolled by such order.] Notwithstanding the foregoing provisions of this paragraph, a city or town any portion of which is within the limits of an area designated as a

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critical defense housing area by the federal government at the time of adoption of the decontrol resolution, shall not become decontrolled without the approval of the commission.

§ 3. Section twelve of such chapter is hereby amended by inserting therein a new subdivision, to be subdivision two-a, to read as follows:

2-a. Upon the issuance of an order of decontrol or upon the filing of a resolution resulting in decontrol of a housing accommodation pursuant to subdivision two, such decontrol shall take place:

(a) if the landlord and tenant execute a written lease for a term of not less than two years wherein the landlord agrees to maintain the same services and equipment required by this act and which provides for an increase in the maximum rent not in excess of fifteen percent for the first year and not more than a second five percent increase for the second year and otherwise continues the terms and conditions of the existing tenancy; upon the execution of such lease;

(b) if the landlord offers the tenant a lease in accordance with the terms provided in paragraph (a) and the tenant fails to execute such lease, six months from the date that the commission issued the order or the date the municipality filed the resolution, provided that the landlord has notified the tenant in writing by certified mail that his failure to execute the lease within thirty days of such notification will result in the decontrol of the housing accommodation on the date set forth therein, such date to be the expiration of such thirty days or such six months, whichever is later; or

(c) if the landlord does not offer the tenant a lease in accordance with the terms provided in paragraph (a), two

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years from the date the commission issued the order or the municipality filed the resolution.

§ 4. This act shall take effect immediately.

CHAPTER 1012

AN ACT to amend the local emergency housing rent control act, in relation to regulations

Became a law July 2, 1971, with the approval of the Governor. Passed by a majority vote, three-fifths being present

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. Subdivision five of section one of chapter twenty-one of the laws of nineteen hundred sixty-two, constituting the local emergency housing rent control act, as amended by a chapter of the laws of nineteen hundred seventy-one entitled "An act to amend the local emergency housing rent control act, in relation to limiting the authority of a city having a population of one million or more to subject additional housing to the regulation and control of residential rents and eviction," is hereby amended to read as follows:

5. Authority for local rent control legislation. Each city having a population of one million or more, acting through its local legislative body, may adopt and amend local laws or ordinances in respect of the establishment or designation of a city housing rent agency. When it deems such action to be desirable or necessitated by local conditions in order to carry out the purposes of this section, such city, except as hereinafter provided, acting

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through its local legislative body and not otherwise, may adopt and amend local laws or ordinances in respect of the regulation and control of residential rents, including but not limited to provision for the establishment and adjustment of maximum rents, the classification of housing accommodations, the regulation of evictions, and the enforcement of such local laws or ordinances. The validity of any such local laws or ordinances, and the rules or regulations promulgated in accordance therewith, shall not be affected by and need not be consistent with the state emergency housing rent control law or with rules and regulations of the state division of housing and community renewal.

Notwithstanding the foregoing, no local law or ordinance shall hereafter provide for the regulation and control of residential rents and eviction in respect of any housing accommodations which are (1) presently exempt from such regulation and control or (2) hereafter decontrolled either by operation of law or by a city housing rent agency, by order or otherwise. No housing accommodations presently subject to regulation and control pursuant to local laws or ordinances adopted or amended under authority of this subdivision shall hereafter be by local law or ordinance *or by rule or regulation which has not been theretofore approved by the state commissioner of housing and community renewal* subjected to more stringent or restrictive provisions of regulation and control than those presently in effect.

§ 2. This act shall take effect immediately.

EXPLANATION—Matter in *italics* is new; matter in brackets [ ] is old law to be omitted.

Supreme Court, U. S.
FILED
DEC 8 1980
MICHAEL RODAK, JR., CLERK

No. 80-669

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

BENSON REALTY CORP., CHAI ASSOCIATES, INC., HINCKLEY REALTY CORP., 615 EAST 168TH ST. CORP., ROBERT BEREZIN, SHIRLEY BEREZIN, MORRIS FADER, ANITA FADER, COMMUNITY HOUSING IMPROVEMENT PROGRAM, INC., BRONX REALTY ADVISORY BOARD, INC., ASSOCIATED BUILDERS & OWNERS OF GREATER NEW YORK, INC., AND 383 EAST 17TH ST. INC., INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,

Appellants,

v.

EDWARD KOCH, AS MAYOR OF THE CITY OF NEW YORK, ANTHONY GLIEDMAN, AS ADMINISTRATOR OF THE HOUSING AND DEVELOPMENT ADMINISTRATION OF NEW YORK CITY, DANIEL W. JOY, AS COMMISSIONER OF THE DEPARTMENT OF RENT AND HOUSING MAINTENANCE OF NEW YORK CITY, JOSEPH B. GOLDMAN, AS COMMISSIONER OF THE NEW YORK STATE DIVISION OF HOUSING & COMMUNITY RENEWAL AND CITY RENT AGENCY,

Appellees.

On Appeal from the Court of Appeals of the State of New York

BRIEF OPPOSING MOTION TO DISMISS OR AFFIRM

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Appellees.

On Appeal from the Court of Appeals of the State of New York

BRIEF OPPOSING MOTION TO DISMISS OR AFFIRM

I

By Establishing What Amounts to a Conclusive Presumption, the Court of Appeals Has Denied the Appellants the Right to Present Their Case

One of the basic problems in this case is procedural. How *can* property owners in New York get a meaningful day in court? How can they get a hearing on the merits where their contentions may receive full and adequate consideration, and such an opportunity to present their case as the due process clause requires?

The appellees seek to impugn the appellants' case by saying that it rests on "their mere affidavits." (Motion, p. 4, Heading.)[1] The appellants would have welcomed an opportunity to prove their case by evidence, but this was foreclosed by the New York courts, acting pursuant to motions made by the appellees.

The complaint in this case was served on or about July 7, 1977. (R. 1, 158.)[2] Thereafter, the defendants filed their answers (in July and August, 1977), in which they asserted as a complete defense that "the allegations of the complaint failed to state a cause of action." (R. 209, 211, 213, 216.) In June, 1978, the defendants (appellees) filed motions to dismiss the complaint. (R. 219, 231.) The case was then heard in Special Term by Morton, J., on the plaintiffs' motion for summary judgment and the defendants' motion to dismiss.

On September 14, 1978, Morton, J., found "that the plaintiffs make a persuasive case as to the infirmities of rent control," but he concluded that the validity of rent control and rent stabilization laws should not "now be decided on the basis of papers alone." (R. 15.) With respect to the defendants' motion to dismiss, Morton, J., held that "an adjudication on the

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[1] The Motion to Dismiss or Affirm has been filed by counsel for the State of New York on behalf of Joseph B. Goldman, Commissioner of the New York State Division of Housing and Community Renewal. No Motion has been filed on behalf of the New York City defendants.

[2] The "R." reference is to the Record in the New York Court of Appeals, a copy of which has been lodged with the Clerk of this Court.

merits of rent control and rent stabilization must await the trial of this action and will not be decided on these motions." (R. 17.) In conclusion, Morton, J., referred to "the dilapidated condition and abandoned status of too much of the housing stock in New York City, undoubtedly due in small or large part to the existence of rent control." He concluded (R. 20):

> Accordingly, the court directs that the parties proceed expeditiously to trial and that upon the filing of a statement of readiness and note of issue the calendar clerk shall place this matter at the head of the appropriate trial calendar.

If this order had been accepted, the plaintiffs would have had an opportunity to present their case. However, both parties appealed. Specifically, the defendants (appellees) appealed "from so much of an order made by Mr. Justice Morton . . . as denied defendants-respondents-appellants' motion for dismissal of the complaint." (R. 7)

When the case was heard by the Appellate Division, that court upheld the appeal of the present respondents, holding that the motion to dismiss the complaint should have been granted, on the ground that the "plaintiffs have failed to submit sufficient evidence to rebut the presumption that the laws in question are constitutional." (R. 262, 263.)

This was upheld by the Court of Appeals.

In light of the court's summary disposition of the case, how could the appellants have presented evidence (in the words used in the opinion of the New York Court of Appeals) sufficient to demonstrate *"beyond a reasonable doubt* that there is no factual basis" (Juris. Statement, p. 2a; emphasis supplied) and thereby rebut the presumption that the laws in question are constitutional? [3] The Court of Appeals' holding makes it impos-

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[3] It could be argued by the appellees that it was incumbent upon the appellants to demonstrate conclusively in their affidavits that there was no factual basis for the Legislature's declarations regarding the existence of a housing emergency. However, it would be unrealistic to require the appellants to present their entire case in affidavits. Appellees themselves in plicitly recognize that a "more *complete* and *current*" record is needed before it could be determined whether the continuation of rent control is justified. (Motion, p. 7; emphasis in original.)

sible, for all practical purposes, for the appellants to overcome the presumption, and thus converts the presumption into a conclusive presumption. As a result, that court's decision is contrary to the position of this Court that such a presumption cannot be made conclusive, and that "[i]t is always open to judicial inquiry whether the exigency still exists upon which the continue operation of the law depends." *Home Building & Loan Association* v. *Blaisdell,* 290 U.S. 398, 442.

Given that the appellants are challenging the Court of Appeals' holding which prevented this case from going to trial, it comes with poor grace for the appellees to say that the appellants' case is presented on "their mere affidavits." They had no opportunity to present it otherwise. Moreover, in such a situation, the law is clear that the allegations made in the complaint must be accepted as true, and that the facts stated in "the papers," including the affidavits filed on behalf of the appellants, must be accepted as true. (See Juris. Statement, p. 6, n. 13.) As this Court very recently said in *Wolston* v. *Readers Digest Assn., Inc.,* 433 U.S. 157, 162:

> Since this case was decided on respondents' motion for summary judgment, we must construe the record most favorably to petitioner. *E.g.,* Bishop v. Wood, 426 U.S. 341, 347, n. 11 (1976); United States v. Diebold, Inc., 369 U.S. 654, 655 (1962).

The appellees do attempt to respond to the appellants' procedural argument by claiming that the New York rent laws "have been carefully scrutinized and implemented by the New York Court of Appeals." (Motion, p. 5.) They point to a number of cases in which the court, generally speaking, upheld several legislative acts passed in 1971 which reflected the State's policy at that time of gradual decontrol. [4] These cases, however, indicate little more than a continual willingness of the Court of Appeals to uphold all state legislation concerning the

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[4] This policy was reversed three years later when the State Legislature enacted the Emergency Tenant Protection Act of 1974 (L. 1974, ch. 576 § 4) which placed under rent stabilization those apartments which had been deregulated under the 1971 laws. The 1974 act also extended rent stabilization to apartments built between 1969 and 1973.

regulation of rents, and do not call into question the appellants' contention that in this case the court effectively immunized the rent laws from any constitutional attack.

That should not be possible under the Federal Constitution.

II

The Record Clearly Establishes That There Is No Longer Any Basis for a Finding of Emergency

The appellants do not claim that their rights to due process have been violated solely on the ground that the New York Court of Appeals has denied property owners a meaningful day in court. It is also the appellants' view that the New York's rent laws are unconstitutional because the record in this case demonstrates that a factual basis for a finding of emergency no longer exists. The many references in the record to the 37-year duration of this supposed "emergency" (R. 88-92, 134-37, 154, 235-37), as well as to the current number of apartment abandonments which annually take place (R. 41, 53, 70-74, 102, 123, 246), are sufficient to cast serious doubt on the claim that New York City is still faced with a true housing shortage which constitutes "a public exigency [which] will justify the [L]egislature in restricting property rights in land to a certain extent without compensation." *Block* v. *Hirsh,* 256 U.S. 135, 156.

In their Motion to Dismiss or Affirm, counsel for the State attempt to show that the presumption in favor of the constitutionality of New York City's rent laws is well-founded. [5] While acknowledging that the existence of a housing emergency is a constitutional prerequisite to the valid operation of these laws, they nonetheless contend that there is good reason to believe that the State Legislature had a factual basis for its

[5] A legislative enactment carries a presumption of constitutionality because it is presumed that the Legislature has acted on the basis of facts which are necessary to support the legislation. *United States* v. *Carolene Products Co.,* 304 U.S. 144, 152.

"emergency" declarations. In support of their argument, appellees refer to the statement of the Court of Appeals to the effect that (Juris. Statement, pp. la-2a):

> The need for rent control has been re-examined legislatively at intervals of three years, the most recent such review being the March 27, 1980 Report of the New York State Temporary Commission on Rental Housing, which concluded that "There is a need for continuing a form of rent regulation in those jurisdictions in which housing accomodations are presently subject to rent control or rent stablization."

This reference by the court, however, does not amount to a factual basis for a finding of emergency. To the contrary, the statement of the Temporary Commission on Rental Housing only points to the "need" for continuing rent regulation in New York City; it cannot be assumed that this need is based on a housing emergency. It is more likely that the "need" is based on political considerations, which is the very thing that the due process clause and the equal protection clause were designed to guard against. In addition, neither this statement nor the other observation made by the Court of Appeals that the Legislature has re-examined "the need for rent control" every three years contains any reference to facts which would permit a court to determine whether an emergency arguably exists. When this evidence is contrasted with that presented to the Court of Appeals in *I.L.F.Y. Co.* v. *Temporary State Housing Commission,* 10 N.Y. 263 (1961), *appeal dismissed,* 355 U.S. 12, and *Lincoln Building Associates* v. *Barr,* 1 N.Y.2d 413 (1956), *appeal dismissed,* 355 U.S. 12, the paucity (or absence) of evidence to support a finding of emergency here become clear.

CONCLUSION

Probable jurisdiction should be noted.

Respectfully submitted,

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No. 80-669

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

BENSON REALTY CORP., CHAI ASSOCIATES, INC., HINCKLEY REALTY CORP., 615 EAST 168TH ST., CORP., ROBERT BEREZIN, SHIRLEY BEREZIN, MORRIS FADER, ANITA FADER, COMMUNITY HOUSING IMPROVEMENT PROGRAM, INC., BRONX REALTY ADVISORY BOARD, INC., ASSOCIATED BUILDERS & OWNERS OF GREATER NEW YORK, INC., AND 383 EAST 17TH ST., INC., INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,

Appellants,

v.

EDWARD KOCH, AS MAYOR OF THE CITY OF NEW YORK, ANTHONY GLIEDMAN, AS ADMINISTRATOR OF THE HOUSING AND DEVELOPMENT ADMINISTRATION OF NEW YORK CITY, DANIEL W. JOY, AS COMMISSIONER OF THE DEPARTMENT OF RENT AND HOUSING MAINTENANCE OF NEW YORK CITY, JOSEPH B. GOLDMAN, AS COMMISSIONER OF THE NEW YORK STATE DIVISION OF HOUSING & COMMUNITY RENEWAL AND CITY RENT AGENCY,

Appellees.

On Appeal from the Court of Appeals of the State of New York

BRIEF OPPOSING MOTION TO DISMISS OR AFFIRM FILED BY THE CITY APPELLEES

INTRODUCTION

The Motion to Dismiss or Affirm of the New York State appellee was filed on November 25, 1980. On December 8, 1980, the appellants filed a Brief Opposing the State appellee's Motion. At that time, no Motion had been filed on behalf of the several New York City appellees. Because of an extension of time, the Motion to Dismiss or Affirm of the City appellees ("City Motion") was not filed until December 26, 1980.

The City Motion raises little that is new. In order that it may not go by default, however, this Brief is filed in opposition to the City Motion. All of the arguments included in the Brief opposing the State's Motion to Dismiss or Affirm are applicable here, and this Brief will be limited to answering other material in the City Motion.[1]

I

With respect to *Kaplan* v. *Prince,* 444 U.S. 938, the City appellees rely on U.S. Law Week for a statement of the issues before this Court. City Motion 11. But, as pointed out in our Jurisdictional Statement (p. 12, n. 21), the *Kaplan* case focused on contract claims. There was in that case a lease which allowed the owner to eliminate services under certain circumstances. This was prevented by the rent laws. The contention made in the case was that the New York statute violated the impairment of the obligation of contracts clause of the Constitution (Art. I, Section 10), and that this impairment of the contract was a taking without just compensation. No such arguments are before the Court in this case.

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[1] The City appellees are correct in saying that "Only the appellants appealed to the Court of Appeals (R. 259)." City Motion 9. This merely highlights the strange procedural situation which is found in this case. The Court of Appeals, despite the fact that the appellees here did not appeal, granted them relief. It held, augmenting the decision of the Appellate Division, "that defendants are entitled to a declaration of constitutionality" (J.S. App. 1a); and it modified the order of the Appellate Division in favor of the appellees despite the fact that they had not appealed. (J.S. App. 2a.)

II

The City appellees list a number of other cases in which the constitutionality of rent controls have been upheld. They then claim that "[l]egislation does not become unconstitutional solely because it exists for more than a few years." (City Motion 12.) In this way, they have conveniently ignored the holding in the first case which they cite, *Block* v. *Hirsh,* 256 U.S. 135. Speaking for the Court there, Mr. Justice Holmes said (256 U.S. at 157):

> The [rent control] regulation is put and justified only as a temporary measure. See *Wilson* v. *New,* 243 U.S. 322, 345, 346. *Fort Smith & Western R. R. Co.* v. *Mills,* 253 U.S. 206. A limit in time, to tide over a passing trouble, well may justify a law that could not be upheld as a permanent change.

In light of the repeated renewal of rent regulations during the past thirty-seven years, the City cannot seriously contend that the current laws are a "temporary measure."

III

It is true that there have been so-called legislative "findings" at various times in the past thirty-seven years. But these have come to be routine and *pro forma,* a means by which the legislative bodies give themselves power through a verbal tug at their own bootstraps. Over the years the situation has in fact changed greatly, yet the legislative bodies repeat the same "findings."

As the affidavits in this case show—and they are the only opportunity the appellants have had to make "proof" in this case—the fact is overwhelmingly clear that rent control in New York City has been disastrous for the purpose of achieving an increased supply of housing. It has resulted in the abandonment of hundreds of thousands of housing units, and, even more clearly, it has brought about such an impossible economic situation that hundreds of thousands of units have been taken over by the City on foreclosure for default in paying real estate taxes. This has produced a loss of billions of dollars in real estate taxes. (See J.S. 9; R. 72, 83.) Because of the rent

legislation, the City is by far the largest landlord in the City, and it is unable to carry out the necessary rehabilitation. Thus, rent control is its own cause of a low vacancy rate. And in the process, it has caused the extinction of the interest of the owners in hundreds of thousands of housing units. It is a vicious circle which destroys the owners' property interests, and does not provide housing. It cannot properly or constitutionally be justified year after year by a legislative litany which ignores pregnant facts.

The City appellees, at p. 15 of their Motion, recite a number of articles and studies which, they say, provide factual support for their position. This material has never been in evidence in this case, subject to cross-examination or criticism as to its methods, substance, and accuracy.

Moreover, the City appellees' contention that a factual basis for the City Council's recent finding of emergency exists is not supported by the material which they now present. The long-standing condition of the New York City rental housing market does not indicate that the City is faced with "a state of acute emergency." (City Motion 13.) Rather, it shows that the problems in New York are endemic under the current long-continued legislative provisions. As the Supreme Court of Pennsylvania noted in *Warren* v. *City of Philadelphia,* 387 Pa. 362, 127 A.2d 703, 705 (1956), "ordinary conditions or customary existing conditions are not emergencies."

IV

As the City appellees observe (City Motion 8-9), the appellants' attorney stated in the Appellate Division "that he did not believe there were any triable issues of fact and that he believed that the allegations of his complaint were sufficient to grant judgment on the pleadings." This was, of course, on the assumption that the facts alleged and shown by the affidavits would be evaluated.

But the Court of Appeals reached its decision on the ground that the facts on which the appellants rely "do not demonstrate *beyond a reasonable doubt*" that the emergency no

longer exists. (J.S. 2a; emphasis supplied.) This amounts to a holding as a matter of law, in the context of this type of case, that the statute is inevitably constitutional, since, as a practical matter (as the history of the past thirty-seven years shows), no facts can ever be shown which will require an adverse conclusion "beyond a reasonable doubt." This is surely not what this Court had in mind when it said that it "is always open to judicial inquiry whether the exigency still exists upon which the continued operation of the law depends." *Home Building & Loan Association* v. *Blaisdell*, 290 U.S. 398, 442.

V

Finally, the City appellees contend, somewhat blandly, that the appellants "should seek their relief in the legislature." (City Motion 16.) But this is a *constitutional* case. Constitutions have been adopted in this country for the purpose, among others, of protecting the people from (1) excessive exercises of legislative power, and from (2) executive failures in administering statutes, which have the same effect. It is the function of the courts to intervene when the actions of legislative bodies or executive authorities are in disregard of limitations imposed by the Constitution.

This is familiar learning, of course, but it is the essence of the American republic. While the Constitution was under consideration in the States, Alexander Hamilton wrote (Federalist, No. 78):

> Limitations of this kind can be preserved in practice no other way than through the medium of the courts of justice; . . . Without this, all the reservations of particular rights and privileges would amount to nothing.

And as the great Chief Justice said in *Marbury* v. *Madison*, 1 Cranch 137, 177: "It is emphatically the province and the duty of the judicial department to say what the law is."

The City appellees say that the appellants' complaint here is that "The legislatures which have repeatedly reenacted these laws have exercised bad judgment." (City Motion 17.) But that is not the appellants' contention. The questions which the

appellants raise are constitutional issues—whether, under all the circumstances, routinely repeated actions of the legislative bodies in declaring an "emergency," now extending over a period of thirty-seven years, can be justified within the restraints imposed by the Federal Constitution. That is clearly a question for this Court to decide. As a contemporary scholar has said:

> On the whole, there is nothing in our entire governmental structure which has a more leakproof claim to legitimacy than the function of the courts in reviewing state acts for federal unconstitutionality.

Black, Structure and Relationship in Constitutional Law 74 (1969).

CONCLUSION

Probable jurisdiction should be noted.

Respectfully submitted,
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